FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 99-161

In the Supreme Court of the United States

October Term, 1999

Chad Weisgram, et al.

Petitioner,

vs.

Marley Company, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI: FILED JULY 22, 1999
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TABLE OF CONTENTS

PAGE

U.S. District Court Civil Docket Sheet for case #95-CV-103 – 10/10/97 1

U.S. District Court Civil Docket Sheet for case #95-CV-103 (events between 10/17/97 and 3/17/98 – 03/17/98 24

U.S. District Court Civil Docket Sheet for case #95-CV-104 – 10/10/97 28

Complaint (Weisgram) – 07/31/95 34

Complaint (State Farm) – 07/31/95 39

Answer to State Farm complaint – 08/25/95 45

Amended answer to Weisgram complaint – 08/31/95 51

Order granting motion by plaintiff State Farm to consolidate case – 02/12/96 64

Order of final pre-trial by Honorable Karen K. Klein – 05/15/97 66

Defendant's Motion for Hearing to Exclude Testimony of Plaintiff's Experts under Rule 702 – 05/16/97 75

Order on pending motions – including order denying motion for a hearing to exclude testimony by plaintiff's experts – 05/20/97 77

Final jury instructions – 05/29/97 81

Verdict – 05/29/97 116

Judgment – 06/17/97 121

Defendant's Motion for Judgment of a Matter of Law or Alternatively for a New Trial – 06/27/97 123

Memorandum and order denying motion for judgment as a matter of law and for new trial included at A-28 in Joint Petition for Writ of Certiorari – 09/04/97 127

Eighth Circuit Panel Majority Opinion and Dissent of Judge Bright included at A-1 in Joint Petition for Writ of Certiorari – 02/23/99 128

Judgment by United States Court of Appeals for the Eighth Circuit in Chad Weisgram v. Marley Company, No. 97.3735 – 02/23/99 129

Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc 131

Appellant's Response to Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc – 04/08/99 152

Order Denying Petition for Rehearing and for Rehearing En Banc included at A-41 in Joint Petition for Writ of Certiorari – 04/26/99 169

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U.S. District Court
District of North Dakota (Southeastern)

CIVIL DOCKET FOR CASE #: 95-CV-103

Weisgram v. Marley Company, et al — Filed: 07/31/95
Assigned to: Hon. Rodney S. Webb — Jury demand: Both
Referred to: Hon. Karen K. Klein
Demand: $50,000 — Nature of Suit: 365
Lead Docket: 95-CV-104 — Jurisdiction: Diversity
Dkt # in member : is 3:95-cv-00104

Cause: 28:1332 Diversity-Personal Injury

CHAD WEISGRAM,
individually
and on behalf of the heirs of
Bonnie Jo Weisgram,
decedent,
plaintiff

Paul Andrew Strandness
[COR LD NTC]
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Daniel J. Dunn
[COR LD NTC]
MARING WILLIAMS LAW OFFICE, PC
PO BOX 2103
FARGO, ND 58107-2103
701-237-5297

v.

MARLEY COMPANY, a Delaware Corporation, and its subsidiary defendant	James S. Hill [COR LD NTC] ZUGER KIRMIS & SMITH 316 N 5 ST PO BOX 1695 BISMARCK, ND 58502-1695 701-223-2711 Christine A. Hogan [COR LD NTC] ZUGER KIRMIS & SMITH PO BOX 1695 BISMARCK, ND58502 701-223-2711
MARLEY ELECTRIC HEATING COMPANY, a Delaware Corporation, and defendant	James S. Hill (See above) [COR LD NTC] Christine A. Hogan (See above) [COR LD NTC]
UNITED DOMINION INDUSTRIES INC., a Delaware Corporation defendant	James S. Hill (See above) [COR LD NTC]

Docket as of October 10, 1997 10:17 am
Page 1 NON-PUBLIC

INTERNAL USE ONLY: Proceedings include all events.
3:95cv103 Weisgram v. Marley Company, et al

7/31/95	1	COMPLAINT (Summons issued-1); jury demand (jo) [3:95cv103]
7/31/95	2	RECEIPT #1716 for filing fee of $120 (jo) [3:95cv103]
8/10/95	3	RETURN OF SERVICE executed upon defendant Marley Company on 7/31/95 Answer due 8/20/95 for Marley Company (dst) [Entry date 08/15/95] [3:95cv103]
8/23/95	4	ANSWER by defendant United Dominion Ind. and its subsidiary, the Marley Co; to [1-1]; jury demand (jo) [3:95cv103]
8/31/95	5	ANSWER by defendant Marley Company, defendant United Dominion Ind to [1-1]; jury demand (rh) [Entry date 09/05/95] [3:95cv103]
9/19/95	6	ORDER by Hon. Karen K. Klein Scheduling/discovery conference set for 10/26/95 at 10:30 AM (cc: all counsel) (1j) [3:95cv103]
10/26/95	7	CLERK'S MINUTES: of 16b Sched. Conf. before Hon. Karen K. Klein ; Scheduling conference held Oct. 26, 1995; crt rec'd plan; csnl may Consent to Proceed Bef. Mag. Judge; no trial or final p/t set today; Mag. Klein will handle early sett. conf. in both cases A3-95-104-State Farm v. Marley Co. on Sept. 27, 1996 at

9:00 in Fgo; (jo) [Entry date 10/31/95] [3:95cv103]

11/1/95 8 SCHEDULING ORDER Hon. Karen K. Klein ; Discovery set for 10/1/96 ; dispositive motions due by 11/1/96 ; Motion to amend pleadings ddl 1/1/96 ; Expert report due 4/15/96 by pla's & deft's rpts due 5/15/96; Expert witness ddl 4/1/96 by pla's & deft's ddl due 5/1/96 ; Motion to join additional parties ddl 1/1/96; Csl considering to Proceed Bef. Mag. Judge; JT est. 10 days; w/ORDER ENDORSED THEREON APPROVING PLAN; (jo) [3:95cv103]

11/29/95 9 NOTICE of Setting: Jury trial scheduled for February 24, 1997 at 9:30 AM in Fargo bef Judge Webb, Conf. with Court and Counsel at 8:45 in LL Courtroom. Prop Jury Instructions to be filed 10 days prior to trial. Trial Est: 10 days (cc: all counsel, court officials) (mc) [3:95cv103]

12/5/95 10 ORDER by Hon. Karen K. Klein: settlement conference set for 9/27/96 at 9:00 AM, Judge's chambers, US Crthse, Fargo (cc: all counsel) (lj) [3:95cv103]

1/3/96 11 ORDER by Hon. Karen K. Klein: Final Pretrial conference set for 2/3/97 at 1:30 PM, Judge's chambers, US Crthse, Fargo (cc: all counsel) (lj) [3:95cv103]

1/24/96 12 MOTION by pla State Farm to consolidate case w/A3-95-104 (jo) [Entry date 01/25/96] [Edit date 01/25/96] [3:95cv103]

1/24796 13 MEMORANDUM in support of motion to consolidate case w/A3-95-104 [12-1] (jo) [Entry date 01/25/96] [3:95cv103]

2/12/96 14 ORDER by Hon. Rodney S. Webb; granting motion to consolidate case w/A3-95-104 [12-1]; for trial purposes only; 3:95-cv-103 being the lead case 3:95-cv-104 being the member case (cc: all counsel) (jo) [Entry date 02/15/96] [Edit date 02/15/96] [3:95cv103]

2/12/96 -- Docket Modification (Utility Event) Case consolidated for trial purposes; member case A3-95-104 (jo) [Entry date 02/15/96] [3:95cv103]

9/30/96 -- REMARK - Settlement Confr bef Judge Klein on 9/27/96 - case did not settle. (lj) [3:95cv103]

9/30/96 15 MOTION (REQUEST) by defendants to continue (for change of p/trial conference) w/attached Affidavit of Atty Hill (sb2) [3:95cv103]

10/1/96 16 ORDER by Hon. Karen K. Klein with NOTICE OF ENTRY: Discovery ddl ext to 12/31/96; Dispositive motion cutoff ext to 11/15/96; Final Pretrial conference reset from 2/3/97 at 1:30 to 1/24/97 at 10:00; settlement conference set for 1/24/97 (cc: all counsel) (lj) [3:95cv103]

10/1/96 -- Docket Modification (Utility Event) granting motion to continue (for change of p/trial conference) [15-1] (lj) [3:95cv103]

10/3/96 17 STIPULATION and Protective ORDER by Hon. Rodney S. Webb (see order for specifics) (cc: all counsel) (sb2) [3:95cv103]

1/14/97 18 MOTION by dft Marley Electric Htg FOR CONTINUANCE OR, IN THE ALTERNATIVE, TO PRECLUDE EXPERT TESTIMONY AND REQUEST FOR EXPEDITED HEARING (sg) [Entry date 01/16/97] [3:95cv103]

1/14/97 19 BRIEF IN SUPPORT OF MOTION FOR CONTINUANCE FILED by dft Marley Electric Htg regarding Motion FOR CONTINUANCE OR, IN THE ALTERNATIVE, TO PRECLUDE EXPERT TESTIMONY AND REQUEST FOR EXPEDITED HEARING [18-1] (sg) [Entry date 01/16/97] [3:95cv103]

1/17/97 20 RESPONSE by State Farm Ins. to motion FOR CONTINUANCE OR, IN THE ALTERNATIVE, TO PRECLUDE EXPERT TESTIMONY AND REQUEST FOR EXPEDITED HEARING [18-1] (jo) [3:95cV103]

1/17/97 21 NOTICE of Setting: setting hearing on motion FOR CONTINUANCE OR, IN THE ALTERNATIVE, TO PRECLUDE EXPERT TESTIMONY AND REQUEST FOR EXPEDITED HEARING [18-1] at 9:30 on 1/22/97 bef Judge Klein (cc: all counsel, court officials) (lj) [3:95cv103]

1/22/97 22 CLERK'S MINUTES: of hearing on motion to continue before Hon. Karen K. Klein, counsel state their positions; Judge w/review written response of pltf - then will hope to enter a written ruling yet today; discussion re: possible trial dates if continuance is granted (18-1) (lj) [3:95cv103]

1/22/97 23 ORDER by Hon. Karen K. Klein: granting motion FOR CONTINUANCE OR, IN THE ALTERNATIVE, TO PRECLUDE EXPERT TESTIMONY AND REQUEST FOR EXPEDITED HEARING [18-1] ; Final Pretrial conference contd to 5/2/97 at 1:30; Jury trial contd to 5/19/97. Dft's alternative motion to preclude exprt testimony of Sandy Lazarowicz is denied as moot. (cc: all counsel) (lj) [Entry date 01/23/97] [3:95cv103]

1/24/97 24 MOTION by plaintiff for protective order w/attached Cert. of Compliance w/Local Rule 16.1(b)(4) (jo) [3:95cv103]

1/24/97 25 MEMORANDUM by plaintiff in support of motion for protective order [24-1] (jo) [3:95cv103]

1/24/97 26 NOTICE of Setting: Final Pretrial conference bef Judge Klein scheduled for 5/2/97 at 1:30 followed by settlement conference, US Crthse, Fargo (cc: all counsel, court officials) (lj) [3:95cv103]

1/27/97 27 NOTICE of Setting: Jury trial scheduled for Mon., 05/19/97 at 9:30 am in Fgo, bef Judge Webb; trial est. 10 days; Conf w/ crt and counsel in lower level crtrm. This trial was previously set for Mon., 02/24/97 (cc: all counsel, court officials) (sg) [3:95cv103]

1/31/97 28 LTR BY ATTY for dfts Marley Company and United Dominion Ind re pla mtn for protective order [24-1]: advising counsel resolved matter on Jan 24, 1997, Atty Strandness for pla with be withdrawing his mtn---no response by dfts. (copy to Crt) (ak) [3:95cv103]

4/18/97 29 NTC OF MTN & MOTION by plaintiff in limine to exclude from trial the unqualified & inadmissible forensic opinions related to the cause of decedent's death as proffered by Dr. Paul D. Larsen (jo) [3:95cv103]

4/18/ 97 30 MEMORANDUM(BRIEF) by plaintiff in support of motion in limine to exclude from trial the unqualified & inadmissible forensic opinions related to the cause of decedent's death as proffered by Dr. Paul D. Larsen [29-1] (jo) [3:95cv103]

4/18/97 31 AFFIDAVIT of Paul E. Strandness regarding memorandum [30-1] w/attached exhibits; (jo) [3:95cv103]

4/21/97 32 MOTION by defendants to preclude John Gorman from giving expert test. for non-compliance with Rule 26(a)(2); (jo) [3:95cv103]

4/21/97 33 MEMORANDUM by defendantin support of motion to preclude John Gorman from giving expert test. for non-compliance with Rule 26(a)(2); [32-1] w/attached tabs 1 & 2 and copy of Depo and attachments along w/a video tape called Bonnie Weisgram/Baseboard heater Analysis/John Gorman P.E. 8/96; (jo) [3:95cv103]

4/22197 34 MOTION by pla State Farm to compel production of documents; Consumer Product Safety Commission docs in connection w/Berko/Marley Co MBBM and MBBL series heaters. (dj) [3:95cv103]

4/22/97 35 MEMORANDUM (Brief) by pla State Farm in support of motion to compel production of documents [34-1] (dj) [3:95cv103]

4/22/97 36 CERTIFICATE OF COMPLIANCE w/Local Rule 16.1(b)(4) by pla State Farm, regarding mtn to compel production of documents (34-1) (dj) [3:95cv103]

5/2/97 37 RESPONSE by defendant, Marley to motion to compel [34-1]CPSC documents; (jo) [3:95cv103]

5/2/97 38 CLERK'S MINUTES: of final p/t conf. before Hon. Karen K. Klein trial procedure discussed; witn. will not be excluded from the crtrm; Crt will rule on mtns #32(John Gorman issue) & 34(compel prod. of docs) after all csnl has responded; Crt will approve p/t stmt plan upon orig. being submitted; RECESS (jo) [3:95cv103]

5/6/97 39 RESPONSE(BR IN OPP) by plaintiff to motion to preclude John Gorman from giving expert test. for non-compliance with Rule 26(a)(2); [32-1] (jo) [3:95cv103]

5/7/97 40 Pla, State Farm's NTC OF MTN & MOTION to exclude testimony of Richard Moore based upon late disclosure and the cumulative nature of his testimony; (jo) [3:95cv103]

5/7/97 41 MEMORANDUM in support of motion to exclude testimony of Richard Moore based upon late disclosure and the cumulative nature of his testimony; [40-1] w/attached exhibits; (jo) [3:95cv103]

5/7/97 42 Designation of depo. to be used at trial by pla State Farm (jo) [3:95cv103]

5/9/97 43 TRIAL BRIEF submitted by pla State Farm; (jo) [3:95cv103]

5/9/97 44 TRIAL BRIEF submitted by pla (sg) [3:95cv103]

5/9/97 45 JOINT PROPSED SPECIAL VERDICT and JOINT PROPOSED JURY INSTRUCTIONS by plaintiff (sg) [3:95cv103]

5/12/97 46 OBJECTION (MOTION) BY DFTS TO PLA'S Rule 26 Expert Rebuttal witness disclosure Rule 26(a)(2); [32-1] (jo) [Edit date 05/20/97] [3:95cv103]

5/14/97 47 MOTION by defendants in limine re: to prohibit duplicate opening statements, multiple wit. exam. & contrasting argument by consolidated plats; (jo) [3:95cv103]

5/14/97 48 MEMORANDUM by defendantin support of motion in limine re: to prohibit duplicate opening statements, multiple wit. exam. & contrasting argument by consolidated plats; [47-1] w/attached exh (jo) [3:95cv103]

5/14/97 49 RESPONSE by defendant to motion to exclude testimony of Richard Moore based upon late disclosure and the cumulative nature of his testimony; (40-1) (jo) [3:95cv103]

5/14/97 50 RESPONSE by defendant to motion in limine to exclude from trial the unqualified & inadmissible forensic opinions related to the cause of decedent's death as proffered by Dr. Paul D. Larsen [29-1] w/attached exh. 1; (jo) [3:95cv103]

5/15/97 51 Requested JURY INSTRUCTIONS by defendants (faxed copy of same recvd on 5/14/97) (sb2) [3:95cv103]

5/15/97 -- REMARK - Revised Exhibit List received (sb2) [3:95cv103]

5/15/97 -- REMARK - recvd copy of dft's trial memorandum via fax this date (original to follow) (sb2) [3:95cv103]

5/15/97 52 ORDER OF FINAL PRE-TRIAL by Hon. Karen K. Klein PTC held 1:30 5/2/97 (cc: all counsel) (sb2) [Entry date 05/16/97] [3:95cv103]

5/16/97 53 RESPONSE(BRIN OPP) by plaintiff to motion in limine re: to prohibit duplicate opening statements, multiple wit. exam. & contrasting argument by consolidated plats; [47-1] (jo) [3:95cv103]

5/16/97 54 TRIAL BRIEF submitted by defendants (td) [3:95cv103]

5/16/97 55 MOTION by defendants for hearing to exclude expert testimony of John Gorman, Ralph Dolence, and Sandy Lazarowicz under Rule 702 (td) [3:95cv103]

5/16/97 56 MEMORANDUM (BREIF IN SUPP) by dfts in support of motion for hearing to exclude expert testimony [55-1] (td) [3:95cv103]

5/16/97 57 LETTER from plaintiff's counsel indicating that mtn for protective order filed 1/23/97 has been withdrawn (sb2) [Entry date 05/19/97] [3:95cv103]

5/16/97 -- Docket Modification (Utility Event) finding the motion for protective order [24-1] moot, pla has w/drawn the mtn (sb2) [Entry date 05/19/97] [3:95cv103]

5/16/97 58 LETTER from plaintiff's counsel re: its experts for the trial & a short summary of their testimony (sb2) [Entry date 05/19/97] [3:95cv103]

5/16/97 -- REMARK - recvd faxed copy of requested jury instruction #32A, submitted by dfts (sb2) (Entry date 05/19/97] [3:95cv103]

5/16/97 59 CLERK'S MINUTES: of status conference before Hon. Rodney S. Webb; Discussion re: certain trial issues - pla allowed 15 minutes for voir dire and dfts to have 20 minutes; Discussion re: certain trial issues & expert testimony; Crt will deny any Daubert mtn hrgs in advance of trial & may reconsider these issues as trial commences, Crt reviews its Civil procedural order w/counsel; trial estimate: 8 days; Opening statements limited to one hour; Witnesses will not be excluded from crtroom (sb2) [Entry date 05/19/97] [3:95cv103]

5/19/97 60 LETTER from defendants' counsel re: expert witness testimony (sb2) [3:95cv103]

5/19/97 61 Requested JURY INSTRUCTIONS by defendants, #32A (sb2) [Entry date 05/20/97] [3:95cv103]

5/19/97 62 LETTER from plaintiff's counsel re: requested jury instruction #32A, submitted by dfts w/attached case law (sb2) [Entry date 05/20/97] [3:95cv103]

5/19/97 63 Bench BRIEF FILED by defendants to prohibit pla's introduction of evidence of Bonnie Weisgram's good character (sb2) [Entry date 05/20/97] [3:95cv103]

5/19/97 -- CLERK'S MINUTES: of Clerk's Minutes of Jury Trial before Hon. Rodney S. Webb trial commenced this date; Conf held w/counsel, crt sets out general trial procedures; crt denies mtn & hrg concerning the Daubert matter, counsel inform crt parties have agreed as to what damages State Farm has pd, proposed voir dire is suggested by counsel; crt reserves ruling re: Consumer Product Safety Commission investigation of a different Marley heater, crt will expect dfts to accommodate pla re: expert witness who had an emergency this weekend; crt & counsel discuss Rule 26 disclosures, crt directs cooperation from counsel; 14 jurors having previously been drawn, crt makes prel. comments, jurors sworn to ans questions, voir dire commences; (prel. instructions given to counsel at 11:10); counsel state no challenges for cause for jury & exercises challenges; Trial jury of 8 selected & sworn to hear case; Crt gives prel. instructions to jury; Counsel give opening statements; Pla's case commences. (sb2) [Entry date 05/20/97] [3:95cv103]

5/20/97 64 ORDER by Hon. Rodney S. Webb with NOTICE OF ENTRY: ruling reserved on motion by dfts to exclude from trial the unqualified & inadmissible forensic opinions related to the cause of decedent's death as proffered by Dr. Paul D. Larsen; denying dfts'

motion in limine re: to prohibit duplicate opening statements, multiple wit. exam. & contrasting argument by consolidated plas; [47-1] denying motion to preclude John Gorman from giving expert test. for non-compliance with Rule 26(a)(2); [32-1] denying motion to exclude testimony of Richard Moore based upon late disclosure and the cumulative nature of his testimony; [40-1] denying motion by dfts to preclude Howard DeMatties from giving expert testimony; and denying dfts' mtn & request for a hrg to exclude testimony of John Gorman, Ralph Dolence & Sandy Lazarowicz; crt will make Rule 702 determinations during trial as testimony & qualifications of experts are presented and will entertain qualification challenges & requests for Daubert hrgs upon proper objection. (copies to counsel) [46-1] (cc: all counsel) (sb2) [3:95cv103]

5/20/97 -- Docket Modification (Utility Event) denying motion for hearing to exclude expert testimony [55-1], denying motion to compel [34-1], denying motion in limine to exclude from trial the unqualified & inadmissible forensic opinions related to the cause of decedent's death as proffered by Dr. Paul D. Larsen [29-1]; see docket # 64, order of crt (sb2) [3:95cv103]

5/20/97 -- CLERK'S MINUTES: of 2nd day of Jury Trial before Hon. Rodney S. Webb: Plas case continues at 9:00 am. Recess 4:50 pm, Reconvene 5/21/@ 9:00 am (td) [Entry date 05/21/97] [3:95cv103]

5/21/97 65 TRANSCRIPT OF DEPOSITION of Merle Higgs (submitted by dft); this witness testified by depo at jury trial (sb2) [Entry date 05/23/97] [3:95cv103]

5/21/97 -- CLERK'S MINUTES: of 3rd day Jury Trial before Hon. Rodney S. Webb; Plats case continues; discussion in crtroom re: juror Dawn Lemieux--she does know the decedent in this case & just realized that fact this morning, crt excuses jury from any further deliberations, case will be heard before a jury of seven; Plats case continues. (sb2) [Entry date 05/23/97] [3:95cv103]

5/22/97 66 TRANSCRIPT OF DEPOSITION of Matthew Miner (submitted by pla), depo read into record as part of plats case (sb2) [Entry date 05/23/97] [3:95cv103]

5/22/97 -- CLERK'S MINUTES: of 4th day of Jury Trial before Hon. Rodney S. Webb; Plats case continues, Pla rests w/exception to call expert witness Lazarowicz next week; Dft presents its case. (sb2) [Entry date 05/23/97] [3:95cv103]

5/23/97 -- CLERK'S MINUTES: of JURY TRIAL - 5th DAY before Hon. Rodney S. Webb-Fgo: Dfts' case continues - RECESS-4:40 PM (dj) [Entry date 05/28/97] [3:95cv103]

5/27/97 -- CLERK'S MINUTES: of JURY TRIAL - 6th DAY before Hon. Rodney S. Webb-Fgo: Dfts' case continues - crt having ruled that wit Sandy Lazarowicz is permitted to testify and his

testimony is heard - Plas REST - out of hrg of jury, plas resist dfts' R.50 mtn - crt DENIES same - dft moves for mistrial - resisted and DENIED by crt - RECESS-5:05 PM witness Sandy Lazarowicz testifies (dj) [Entry date 05/28/97] [3:95cv103]

5/28/97 67 Bench BRIEF ON LOSS OF CONSORTIUM DAMAGES by defts (dj) [3:95cv103]

5/28/97 -- CLERK'S MINUTES: of JURY TRIAL - 7th DAY before Hon. Rodney S. Webb-Fgo: Dfts' case continues - dfts REST - Plas present rebuttal and all parties re-rest at 2:00 PM - R.50 mtn is re-newed - resisted - mtn denied; counsel having been provided w/crt's final instr, crt hears exceptions crt advises counsel of procedures re, closing arguments; crt's Final Instr will be available from Clk tomorrow at 8:30 AM - RECESS 4:35 PM (Counsel go over exs after recess to determine which exs will go to the Jury) (dj) [Entry date 06/03/97] [3:95cv103]

5/29/97 68 CLERK'S MINUTES: of JURY TRIAL - 8th DAY before Hon. Rodney S. Webb-Fgo: Crt reconvenes and Final Instr given closing arguments and rebuttal presented - procedural instr by crt - CSO & Law Clerk sworn - CASE TO JURY-12:10 PM; counsel indic they are sat w/exs which will go to jury RECESS; Crt RECONVENES to receive verdict-5:30 PM - verdict read in favor of plas - jurors polled, verdict is unanimous and jurors excused and their service acknowledged - Jury excused - crt

comments - ADJOURN-5:40 PM (dj) [Entry date 06/03/97] [3:95cv103]

5/29/97 69 PRELIMINARY JURY INSTRUCTIONS, dated May 19, 1997. (dj) [Entry date 06/03/97] [3:95cv103]

5/29/97 70 FINAL JURY INSTRUCTIONS, dated May 29, 1997. (dj) [Entry date 06/03/97] [3:95cv103]

5/29/97 71 CRT'S RULINGS ON PROPOSED JURY INSTRUCTIONS (dj) [Entry date 06/03/97] [3:95cv103]

5/29/97 72 VERDICT for plas Chad Weisgram; and State Farm Fire & Casualty Ins. and against defts Marley Company, Marley Electric Htg and United Dominion Ind; FINDING (that among other things), ECONOMIC DAMAGES of $100,575.42; NON-ECONOMIC DAMAGES of $500,000 for TOTAL of $600,575.42, no int awarded. (cc: all counsel) (dj) [Entry date 06/03/97] [3:95cv103]

5/30/97 73 RECEIPT by Atty Hogan for exs #393, 394 & 427, pur to Local R. 43.1(B) (Heater exs) (dj) [Entry date 06/03/97] [3:95cv103]

6/17/97 74 JUDGMENT: with NOTICE OF ENTRY: that pla Chad Weisgram, decedent, have judgment against dfts in the sum of $500,000, w/o int; and pla State Farm Fire and Casualty Insurance Company, have judgment against dfts in the sum of $100,575.42, w/o int. terminating case (3:95-cv-00104 3:95-cv-00104) (cc: all counsel)

{09/30/97-Pla State Farm stip bill of costs approved in at of $12,631.19, Doc 194 ---- ak} (dj) [Edit date 10/01/97] [3:95cv103]

6/24/97 75 NOTICE OF ENTRY OF JUDGMENT by Pla State Farm. (dj) [3:95cv103]

6/27/97 76 MOTION by defendant Marley Company for judgment, or alternatively for new trial with supporting brief (ks) [Entry date 06/30/97] [3:95cv103]

6/27/97 77 MOTION by defendant Marley Company to stay of execution of jgm (ks) [Entry date 06/30/97] [3:95cv103]

6/27/97 78 AFFIDAVIT of Christine Hogan regarding motion to stay of execution of jgm [77-1] (ks) [Entry date 06/30/97] [3:95cv103]

7/14/97 79 RESPONSE (BRIEF IN OPP) by pla State Farm to motion for judgment [76-1], motion for new trial [76-2] (td) [Edit date 07/14/97] [3:95cv103]

7/14/97 80 RESPONSE by pla State Farm to motion to stay of execution of jgm [77-1] (td) [Edit date 07/14/97] [3:95cv103]

7/14/97 81 STIPULATED BILL OF COSTS submitted by pla State Farm re judgment [74-2] (td) [3:95cv103]

7/14/97 82 AFFIDAVIT of Daniel J. Dunn regarding bill of costs [81-1] (td) [3:95cv103]

7/15/97 83 RESPONSE by pla Weisgram to motion to stay of execution of jgm [77-1] (td) [3:95cv103]

7/15/97 84 RESPONSE (BRIEF IN OPP) by pla Weisgram to motion for judgment [76-1], motion for new trial [76-2] (td) [3:95cv103]

7/15/97 -- REMARK - Table of Authorities of Pla State Farm Ins att to doc# 79 (td) [3:95cv103]

7/23/97 85 MOTION by deft Marley for leave to file reply brief in support of its post-trial mtns on or before 08/12/97. (dj) [3:95cv103]

8/7/97 86 ORDER by Hon. Rodney S. Webb with NOTICE OF ENTRY: granting dft Marley's motion for leave to file reply brief [85-1] (cc: all counsel) (sb2) [3:95cv103]

8/13/97 87 REPLY (BRIEF IN SUPPT) by dft Marley Company to response to motion for judgment [76-1], motion for new trial [76-2] (td) [3:95cv103]

9/4/97 88 MEMORANDUM AND ORDER by Hon. Rodney S. Webb denying mtn for judgment as a matter of law [76-1], and denying mtn for new trial [76-2] with NOTICE OF ENTRY: (cc: all counsel) (dj) [3:95cv103]

9/4/97 89 ORDER by Hon. Rodney S. Webb with NOTICE OF ENTRY: granting mtn to stay of execution of jgm pending disposition of an appeal [77-1], upon the filing of a bond w/this crt securing pmt of the June 17, 1997 jgm;

further ORDERED dft's mtn for stay on the execution of jgm pending disposition of post-trial mtns is DENIED AS MOOT in light of the crt's decision on those mtns filed this date. (cc: all counsel) (dj) [3:95cv103]

9/16/97 90 AFDT OF MAILING by dft, for proposed Bond on Stay of Execution =and= proposed order (ak) [3:95cv103]

9/16/97 -- PROPOSED Order re crt order that bond securing jdmt be filed [89-1]; and proposed Bond w/proposed order endorsed were submitted by dfts and lodged w/Clk (ak) [3:95cv103]

9/26/97 91 LTR OF ATTY DUNN for pla Chad Weisgram, that State Farm has no obj to supersedeas bnd obtained by Marley Co, nor does Atty Strandness (ak) [Entry date 09/29/97] [3:95cv103]

9/26/97 92 SUPERSEDEAS BOND ON STAY OF EXEC in amt of $ 600,575.42 filed by dfts Marley Company, Marley Electric Htg, United Dominion Ind, w/att POWER OF ATTY by Fed Ins Company of Warren, NJ, dated 09/11/97. Crt approval of bnd endorsed thereon 09/26/97. Bnd filed in compliance with crt order of 09/04/97, [89-1] (ak) [Entry date 09/29/97] [Edit date 09/29/97] [3:95cv103]

9/26/97 93 ORDER by Hon. Rodney S. Webb : re supersedeas bnd [92-1], crt having approved bnd, the execution of any procs to enforce jdmt

is stayed pending appeal (cc: all counsel) (ak) [Entry date 09/29/97] [3:95cv103]

9/30/97 94 ORDER by Hon. Rodney S. Webb with NOTICE OF ENTRY endorsed as 10/01/97: approving Pla State Farm stip bill of costs [81-1], in amt of $12,631.19; the crt having rcvd no obj from Dft Marley. Said costs inserted on jdmt entered 06/17/97, [74-1]. (cc of order and revised Jdmt Doc #74 mailed to Attys Strandness, Dunn, Hill/Hogan) (ak) [Entry date 10/01/97] [3:95cv103]

10/2/97 95 NOTICE OF APPEAL to USCA8 by dfts Marley Company, Marley Electric Htg, United Dominion Ind from USDC final Jdmt [74-2], entered 06/17/97; from denial of mtn for dir verdict by dfts at close of all testimony on 05/28/97; and from Memorandum & Order entered 09/04/97 that den dfts' mtn for jdmt as matter of law, or alt, for new trial. App fee $105 pd by dfts. (ak) [Entry date 10/09/97] [3:95cv103]

10/2/97 96 RECEIPT #64227 - $105 APPEAL FEE pd by dfts (ak) (Entry date 10/09/97] [3:95cv103]

10/2/97 -- ORDER FOR APPELLATE TRANSCRIPT rcvd from dfts for various transcripts. Order presented to Crt Reptr Ketcham for ACK (ak) [Entry date 10/09/97] [3:95cv103]

10/10/97 -- REMARK - Copy of Ntc of App to Attys Strandness and Dunn for pla-appellee (ak) [3:95cv103]

10/10/97 97 Copy of doc entries as forwarded to counsel and USCA8 (ak) [3:95cv103]

10/10/97 -- 2 CERTIFIED and one pl copy of: NTC APP; JDMT; MEMORANDUM & ORDER deny post-jdmt mtns; SUPERSEDEAS BOND; Jury Verdict; and DOCKET ENTRIES, forwarded to USCA8, St. Paul Div Office (ak) [3:95cv103]

INTERNAL USE ONLY: Events between 10/17/97 and 3/17/98.
3:95cv103 Weisgram v. Marley Company, et al
TERMED CSSTAY APPEAL LEADTR

TERMED CSSTAY APPEAL LEADTR

U.S. District Court
District of North Dakota (Southeastern)

CIVIL DOCKET FOR CASE #: 95-CV-103

Weisgram v. Marley Company, et al Filed: 07/31/95
Assigned to: Hon. Rodney S. Webb Jury demand: Both
Referred to: Hon. Karen K. Klein
Demand: $50,000 Nature of Suit: 365
Lead Docket: 95-CV-104 Jurisdiction: Diversity
Dkt # in USCA8 #97-3735NDF : is :00- -00000
Dkt # in member : is 3:95-cv-00104

Cause: 28:1332 Diversity-Personal Injury

11/10/97 -- BR SCHED from USCA 197-3735NDF (ak) [Entry date 11/26/97] [3:95cv103]

3/16/98 100 TRANSC OF FINAL P/T CFR, held 05/19/97, bef Judge Webb (ak) [Entry date 03/17/98] [3:95cv103]

3/16/98 101 TRANSC OF OPEN STMTS held 05/19/97, bef Judge Webb (ak) [Entry date 03/17/98] [3:95cv103]

3/16/98 102 TRANSC OF JURY TRIAL (7 VOLS), proceedings reported: May 19,20,21,22,23,27 & 28, 1998, bef Judge Webb (ak) [Entry date 03/17/98] [3:95cv103]

3/16/98 103 TRANSC OF CLOSING ARGUMENTS, reported on 05/29/97, bef Judge Webb (ak) [Entry date 03/17/98] [3:95cv103]

3/16/98 104 TRANSC OF TESTIMONY DAN E. FREEMAN, reported 05/20/97, bef Judge Webb (ak) [Entry date 03/17/98] [3:95cv103]

3/16/98 105 TRANSC OF TESTIMONY RALPH DOLENCE, reported 05/21/97, bef Judge Webb (ak) [Entry date 03/17/98] [3:95cv103]

3/16/98 106 TRANSC OF TESTIMONY MICHAEL PHY, reported 05/22/97, bef Judge Webb (ak) [Entry date 03/17/98] [3:95cv103]

3/16/98 107 TRANSC OF TESTIMONY RUSSELL OGLE, reported 05/23/97, bef Judge Webb (ak) [Entry date 03/17/98] [3:95cv103]

3/16/98 108 TRANSC OF TESTIMONY SANDY LAZAROWICZ, reported 05/27/97, bef Judge Webb (ak) [Entry date 03/17/98] [3:95cV103]

* * *

9/26/97 92 SUPERSEDEAS BOND ON STAY OF EXEC in amt of $ 600,575.42 filed by dfts Marley Company, Marley Electric Htg, United Dominion Ind, w/att POWER OF ATTY by Fed Ins Company of Warren, NJ, dated 09/11/97. Crt approval of bnd endorsed thereon 09/26/97. Bnd filed in compliance with crt order of 09/04/97, [89-1] (ak) [Entry date 09/29/97] (Edit date 09/29/97] [3:95cv1031

9/26/97 93 ORDER by Hon. Rodney S. Webb : re supersedeas bnd [92-1], crt having approved bnd, the execution of any procs to enforce jdmt is stayed pending appeal (cc: all counsel) (ak) [Entry date 09/29/97] [3:95cv103]

3/30/97 94 ORDER by Hon. Rodney S. Webb with NOTICE OF ENTRY endorsed as 10/01/97: approving Pla State Farm stip bill of costs [81-1], in amt of $12,631.19; the crt having rcvd no obj from Dft Marley. Said costs inserted on jdmt entered 06/17/97, [74-1]. (cc of order and revised Jdmt Doc #74 mailed to Attys Strandness, Dunn, Hill/Hogan) (ak) [Entry date 10/01/97] [3:95cv103]

10/2/97 95 NOTICE OF APPEAL to USCA8 by dfts Marley Company, Marley Electric Htg, United Dominion Ind from USDC final Jdmt [74-2], entered 06/17/97; from denial of mtn for dir verdict by dfts at close of all testimony on 05/28/97; and from Memorandum & Order entered 09/04/97 that den dfts' mtn for jdmt as matter of law, or alt, for new trial. App fee $105

pd by dfts. (ak) [Entry date 10/09/97] [3:95cv103]

10/2/97 96 RECEIPT #64227 - $105 APPEAL FEE pd by dfts (ak) [Entry date 10/09/97] [3:95cv103]

10/2/97 -- ORDER FOR APPELLATE TRANSCRIPT rcvd from dfts for various transcripts. Order presented to Crt Reptr Ketcham for ACK (ak) [Entry date 10/09/97] [3:95cv103]

10/10/97 -- REMARK - Copy of Ntc of App to Attys Strandness and Dunn for pla-appellee (ak) [3:95cv103]

10/10/97 97 Copy of doc entries as forwarded to counsel and USCA8 (ak) [3:95cv103]

10/10/97 -- 2 CERTIFIED and one pl copy of: NTC APP; JDMT; MEMORANDUM & ORDER deny post-jdmt mtns; SUPERSEDEAS BOND; Jury Verdict; and DOCKET ENTRIES, forwarded to USCA8, St. Paul Div office (ak) [3:95cv103]

10/10/97 98 ORDER FOR APPELLATE TRANSCRIPT filed by dfts, w/ACK by Crt Reptr Douglas T. Ketcham indicating completion date of Nov 28, 1997 for transcripts of FPT Cfr, Hrg on P/T mtns-05/16/97, and jury trial-05/19-29/97. (cc: All counsel, crt reptr and USCA8) (ak) [3:95cv103]

10/16/97 99 RECEIPT OF USCA8 for App-Rec forwarded 10/10/97 (ak)

TERMED

U.S. District Court
District of North Dakota (Southeastern)

CIVIL DOCKET FOR CASE #: 95-CV-104

State Farm Fire v. Marley Company, et al Filed: 07/31/95
Assigned to: Hon. Rodney S. Webb Jury demand: Both
Referred to: Hon. Karen K. Klein
Demand: $100,000 Nature of Suit: 385
Lead Docket: 95-CV-103 Jurisdiction: Diversity
Dkt # in lead : is 3:95-cv-00103

Cause: 28:1332 Diversity-Contract Dispute

STATE FARM FIRE & CASUALTY INSURANCE COMPANY plaintiff	Daniel J. Dunn [COR LD NTC] MARING WILLIAMS LAW OFFICE, PC PO BOX 2103 FARGO, ND 58107-2103 701-237-5297
v.	
MARLEY COMPANY, a Delaware corporation defendant	James S. Hill [COR LD NTC] ZUGER KIRMIS & SMITH 316 N 5 ST PO BOX 1695 BISMARCK, ND 58502-1695 701-223-2711

	Christine A. Hogan [COR LD NTC] ZUGER KIRMIS & SMITH PO BOX 1695 BISMARCK, ND 58502 701-223-2711
MARLEY ELECTRIC HEATING COMPANY, a Delaware corporation, and defendant	
UNITED DOMINION INDUSTRIES INC., a Delaware corporation defendant	James S. Hill (See above) [COR LD NTC]
	Christine A. Hogan (See above) [COR LD NTC]

7/31/95	1	COMPLAINT (Summons issued); jury demand (jo) [3:95cv104]
8/1/95	2	RECEIPT #1718 for $120 for payment rec'd yest. for filing fee (jo) [3:95cv104]
8/14/95	3	RETURN OF SERVICE executed upon defendant Marley Company, defendant United Dominion Ind on 8/4/95 Answer due 8/24/95 for United Dominion Ind, for Marley Electric Htg, NON EST as to Marley Electric Heating Company. (rh) [3:95cv104]

8/25/95 4 ANSWER by defendants Union Dominion Ind. and its subsidiary, the Marley Company to [1-1]; jury demand (jo) [3:95cv104]

9/19/95 5 ORDER by Hon. Karen K. Klein: Scheduling/discovery conference set for 10/26/95 at 10:10 AM (cc: all counsel) (lj) [3:95cv104]

9/28/95 6 WAIVER OF SERVICE upon defendant Marley Electric Htg on 9/25/95 Answer due 11/24/95 for Marley Electric Htg (seal) [3:95cv104]

10/26/95 7 CLERK'S MINUTES: of 16b Sched. Conf. before Hon. Karen K. Klein ; Scheduling conference held Oct. 26, 1995; crt has rec'd plan & approv'd same; no trial date or final p/t to be set; Atty Dunn has filed mtn to consolidate this case w/A3-95-103-Weisgram v. Marley Co.; Csnl would like early settl. conf.; Crt will set early sett. conf. for Sept. 27, 1996 in Fgo at 9:00 a.m.; Csnl est. trial no less than 5 days, no more than 10 days. (jo) [Entry date 10/31/95] [3:95cv104]

10/31/95 8 SCHEDULING ORDER Hon. Karen K. Klein; Discovery set for 10/1/96; dispositive motions due by 11/1/96 ; Motion to amend pleadings ddl 1/1/96; Expert report due 5/15/96 by deft's and plats have til 4/15/96; Expert witness ddl 5/1/96 by deft's and plats have til 4/1/96; Motion to join additional parties ddl 1/1/96; trial will be by jury & est. 10 days; Csnl suggesting a possible Consent to Proceed bef. Mag. Judge; w/ORDER ENDORSED THEREON APPROVING PLAN; (jo) [3:95cv104]

11/29/95 9 NOTICE of Setting: Jury trial scheduled for March 17, 1997 at 9:30 AM in Fargo bef Judge Webb; conference with court and counsel at 8:45 in LL Courtroom. Prop Jury Instructions to be filed 10 days prior to trial. Trial Est: 10 days (cc: all counsel, court officials) (mc) [3:95cv104]

12/5/95 10 ORDER by Hon. Karen K. Klein: settlement conference set for 9/27/96 at 9:00 AM, Judge's chambers, US Crthse, Fargo (cc: all counsel) (lj) [3:95cv104]

1/3/96 11 ORDER by Hon. Karen K. Klein: Final Pretrial conference set for 3/7/97 at 9:00 AM, chambers, US Crthse, Fargo (cc: all counsel) (lj) [3:95cv104]

1/24/96 12 MOTION by plaintiff, State Farm Ins. to consolidate case w/A3-95-103 (jo) [3:95cv104]

1/24/96 13 MEMORANDUM by plaintiffin support of motion to consolidate case w/A3-95-103 [12-1] w/att exhibits; (jo) [3:95cv104]

2/5/96 14 RESPONSE by deft Marley Electric Htg to motion to consolidate case w/A3-95-103 [12-1] (dj) [3:95cv104]

2/12/96 15 ORDER by Hon. Rodney S. Webb: granting motion to consolidate case w/A3-95-103 [12-1] 3:95-cv-104 being the member case and with lead case being 3:95-cv-103 Case consolidated for trial purposes (cc: all counsel) (jo) [Entry date 02/15/96] [Edit date 02/15/96] [3:95cv104]

2/15/96 -- REMARK - ALL FURTHER DOCKETING SHOULD BE DOCKETED IN A3-95-103-LEAD CASE (jo) [3:95cv104]

7/9/96 16 NOTICE of Setting: Jury trial prev. scheduled for March 17, 1997 is resched to 02/24/97at 9:30 a.m. bef. Judge Webb in FGO; conf w/counsel at 8:45 in LL Courtroom; Prop Jury Instr to be filed 10 days prior to trial; TRIAL EST:10 days (cc: all counsel, court officials) (td) [3:95cv104]

9/18/96 17 NOTICE of Setting: Final Pretrial conference rescheduled for 2/3/97 at 1:30 PM bef Judge Klein in Fargo (reset to be held along with 3:95cv103) (cc: all counsel, court officials) (lj) [3:95cv104]

1/27/97 -- Docket Modification (Utility Event) ; Pretrial conference reset for 5/2/97 ; Jury trial reset for 5/19/97 (sb2) [3:95cv104]

6/17/97 18 JUDGMENT: with NOTICE OF ENTRY: that pla State Farm Fire and Casualty Insurance Company, have judgment against dfts in the sum of $100,575.42, w/o int. terminating case (cc: all counsel) (NOTE: See also A3-95-103) (dj) [3:95cv104]

UNITED STATES DISTRICT COURT
FOR THE STATE OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Civil Action No. A3-95-103

Chad Weisgram, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent,

Plaintiff,

COMPLAINT AND JURY DEMAND

vs.

Marley company, a Delaware Corporation, and its subsidiary, Marley Electric Heating Company, a Delaware Corporation, and United Dominion Industries, Inc. a Delaware Corporation.

Defendants.

COME NOW the Plaintiffs and for their came of action, state and allege:

I.

That the court has jurisdiction pursuant to 28 U.S.C. 1332 in that the amount in controversy exceeds $50,000.00 and that the parties are citizens of different states; that complete diversity exists between the Plaintiffs and Defendants herein.

II.

That at all times relevant herein, decedent Bonnie J. Weisgram and Plaintiff Chad Weisgram were residents of the State of North Dakota.

III.

That at all times relevant herein, Defendant Marley Electric Heating Company was a Delaware Corporation with its principal place of business in the state of South Carolina.

IV.

That at all times relevant herein, Defendant Marley Company is a Delaware Corporation with its principal place of business in the state of Kansas.

V.

That at all times relevant herein, Defendant Marley Electric Heating Company was owned and or controlled by Marley Company so as to render it liable for Defendant Marley Electric Heating Company conduct.

VI.

That at all times relevant herein, Defendant United Dominion Industries, Inc. is a Delaware Corporation with its principle place of business in the state of North Carolina.

VII.

That at all times relevant herein, Defendant United Dominion Industries, Inc. exercised ownership and or control

over Defendant Marley Company and or Defendant Marley Electric Heating Company so as to render it liable for Defendant Marley Electric Heating Company's conduct.

VIII.

That at all times relevant herein, Defendants were in the business of designing, manufacturing, distributing, and selling an electric baseboard heater known as Model No. MBB2-52, in the State of North Dakota and elsewhere.

IX.

That on December 30, 1993, as a direct and sole result of the Defendants' negligence in the design, testing, manufacturing, distributing, warning and sale of the above-described heater when it was in a defective and unsafe condition, the aforemention electric baseboard heater caused a fatal fire in the home of the decedent Bonnie J. Weisgram, located at 2411 Flickertail Drive North, in the City of Fargo, State of North Dakota; that Defendants were otherwise negligent.

X.

That at the time said heater was manufactured, distributed and sold by the Defendants, said Defendants warranted, both expressly and by implication, that said product was fit for the purposes for which it was manufactured, and was of merchantable quality; that on the contrary, said heater was unfit for the purposes for which it was designed, manufactured and sold, was not of merchantable quality and as a result, Defendants breached its express and implied warranties, resulting in the death of Bonnie J. Weisgram and damage to Plaintiff Chad Weisgram as hereinbefore set forth.

XI.

That as a result of the aforementioned, Bonnie J. Weisgram was killed by the fire and Plaintiff Chad Weisgram, individually and on behalf of the heirs of Bonnie J. Weisgram, was caused to suffer damages in an amount in excess of Fifty Thousand and no/100ths ($50,000.00) Dollars as provided for in §32-21-02 and §32-03.2-04 of the North Dakota Century Code.

XII.

That Plaintiff demands a trial by jury.

WHEREFORE, Plaintiff demands judgment against the Defendants, and each of them, for an amount in excess of Fifty Thousand ($50,000.00) and no/100ths Dollars, exclusive of costs and disbursements incurred herein.

Dated: 7-31-95 ECKMAN, STRANDNESS & EGAN, P.A.

/s/

Paul A. Strandness
Attorney ID #106240
501B Butler Square
100 North Sixth Street
Minneapolis, Minnesota 55403
(612) 338-6565

and

ANDERSON & BAILLY

/s/

Gregory L. Thompson
State Bank Center, Suite 202
3100 13th Avenue SW
P.O. Box 10247
Fargo, North Dakota 58106-0247
701/235-3300

ATTORNEYS FOR PLAINTIFF

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

State Farm Fire & Casualty Insurance Company,	)	Civil No: A3-95-104
Plaintiffs,	)	
vs.	)	**COMPLAINT AND DEMAND FOR JURY TRIAL**
Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation,	)	
Defendants.	)	

For its cause of action against the Defendants, State Farm Fire & Casualty Insurance Company (State Farm) states and alleges as follows:

I.

The Court has jurisdiction over these proceedings pursuant to 28 U.S.C. § 1332 as the amount in controversy exceeds Fifty Thousand and 00/100 Dollars ($50,000.00), and the parties are citizens of different states. There is complete diversity of citizenship between the Plaintiff and Defendants herein.

II.

At all times relevant to these proceedings, Plaintiff State Farm was a citizen and resident of the State of Illinois.

III.

At all times relevant to these proceedings, Defendant Marley Company was a Delaware corporation with its principal place business in the State of Kansas.

IV.

At all times relevant to these proceedings, Defendant Marley Electric Heating Company was a Delaware corporation with its principal place of business in the State of South Carolina.

V.

At all time relevant to these proceedings, Defendant United Dominion Industries, Inc. was a Delaware corporation with its principal place of business in the State of North Carolina.

VI.

At all times relevant to these proceedings, Defendant Marley Company owned and/or controlled Defendant Marley Electric Heating Company so as to render it liable for Defendant Marley Electric Heating Company's negligent or otherwise wrongful conduct.

VII.

At all times relevant to these proceedings, Defendant United Dominion Industries, Inc. exercised ownership and/or control over Defendant Marley Company and/or Defendant Marley Electric Heating Company so as to render it liable for the negligent or otherwise wrongful conduct of Defendant Marley Company and Defendant Marley Electric Heating Company.

VIII.

At all times relevant to these proceedings, the Defendants were in the business of designing, manufacturing, distributing and selling an electric baseboard heater with a model number MBB2-52 in the State of North Dakota and elsewhere.

IX.

A model number MBB2-52 electric baseboard heater was installed in the home of Bonnie Weisgram.

X.

As a direct and proximate result of the Defendants' negligence in the design, testing, manufacturing, distributing, warning and/or sale of the aforementioned electric baseboard heater, a fire occurred at a home owned by Bonnie Weisgram and located at 2411 Flickertail Drive South in the City of Fargo, State of North Dakota, on December 30, 1993.

XI.

The aforementioned fire was caused by a defective and unsafe component or condition within the electric baseboard heater sold by the Defendants.

XII.

At the time the aforementioned electric baseboard heater was manufactured, distributed and sold by the Defendants, said Defendants warranted, both expressly and by implication, that the electric baseboard heater was fit for the purposes for which it was manufactured and was of merchantable quality.

XIII.

At the time the aforementioned electric baseboard heater was manufactured, distributed and sold by the Defendants, said heater was unfit for the purposes for which it was manufactured and was not of merchantable quality. As a result thereof, the Defendants breached the express and implied warranties for the product.

XIV.

As a result of the Defendants' negligence and breach of express and implied warranties, the aforementioned fire destroyed the home located at 2411 Flickertail Drive South, as well as the contents therein. The fire further damaged the structure and contents of the adjacent home owned by Catherine Ferguson located at 2413 Flickertail Drive South in Fargo, North Dakota.

XV.

Plaintiff State Farm provided homeowners' insurance to Bonnie Weisgram's home located at 2411 Flickertail Drive South. Further, State Farm assumed responsibility for the damage caused to Catherine Ferguson's home located at 2413 Flickertail Drive South.

XVI.

As a direct and proximate result of the negligence and breach of express and implied warranties, Plaintiff State Farm, pursuant to its contractual obligations, was compelled to pay for the damages to the aforementioned homes and the contents therein in the amount of One Hundred Thousand Five Hundred Seventy-Five and 42/100 Dollars ($100,575.42).

XVII.

Plaintiff State Farm is entitled to subrogation and/or reimbursement in the amount of One Hundred Thousand Five Hundred Seventy-Five and 42/100 Dollars ($100,575.42) for the property damage caused by the defective and unsafe electric baseboard heater which resulted in the fire.

XVIII.

Plaintiff State Farm reserves the right to raise additional claims and allegations developed during the discovery phase of this lawsuit.

THE PLAINTIFF DEMANDS A TRIAL BY JURY

WHEREFORE, Plaintiff State Farm Fire & Casualty Insurance Company demands judgment against the Defendants, and each of them, in the amount of one Hundred Thousand Five Hundred Seventy-Five and 42/100 Dollars ($100,575.42), its costs and disbursements herein, and such other and further relief as is just and proper.

Dated this 31st day of July, 1995.

CAHILL & MARQUART, P.A.

By /s/
Daniel J. Dunn
Attorneys for Plaintiff
403 Center Avenue
P.O. Box 1238
Moorhead, MN 56561-1238
Telephone: (218) 236-4900
North Dakota License No: 50302

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

State Farm Fire & Casualty Insurance Company,	)	Civil No: A3-95-104
Plaintiff,	)	
v.	)	**ANSWER OF UNITED DOMINION INDUSTRIES, INC. AND ITS SUBSIDIARY, THE MARLEY COMPANY, AND JURY DEMAND**
Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation,	)	
Defendants.	)	

Defendant, United Dominion Industries, Inc., a Delaware corporation, on its own behalf and on behalf of its wholly-owned subsidiary, The Marley Company, for its Answer to Plaintiff's Complaint, states:

I.

Denies all allegations except those admitted, qualified, or otherwise explained in this Answer.

II.

Admits The Marley Company ("Marley") is a wholly-owned subsidiary of United Dominion Industries, Inc.,

("United Dominion"), a Delaware corporation, and states that Marley Electric Heating Company ("Marley Electric"), incorrectly designated in the Complaint as a Delaware corporation, is an unincorporated division of United Dominion.

III.

Admits the allegations in paragraphs I and V of the Complaint, and admits that Defendant United Dominion, through its division, Marley Electric, is in the business of designing, manufacturing, distributing, and selling electric baseboard heaters for use in North Dakota and elsewhere.

IV.

Admits that a fire occurred late on December 29, 1993, or early in the morning on December 30, 1993, at a home owned by Bonnie Weisgram, located at 2411 Flickertail Drive North in the City of Fargo, North Dakota.

V.

Admits that the electric baseboard heater described in paragraph IX was manufactured by Marley Electric.

VI.

The subject electric baseboard heater, when it left the possession and control of Marley Electric, was free of design and manufacturing defects, was reasonably fit for the purpose for which it was designed and intended, was of merchantable quality and was not unreasonably dangerous when prudently used for its intended purpose.

VII.

Denies that Plaintiff's State Farm's damages were caused, contributed to, or enhanced by the subject electric baseboard heater and denies that the heater was the cause or origin of the fire described in paragraph X of the complaint, and further denies that the heater malfunctioned or failed.

VIII.

Alleges that Plaintiff's State Farm's damages were caused, contributed to, or enhanced by the fault or negligence of decedent Bonnie Weisgram and of others over whom this Defendant had no control or right of control.

IX.

The subject electric baseboard heater was designed, manufactured, tested, and assembled with reasonable care and met or exceeded all applicable state and federal safety standards and all applicable industry standards.

X.

Denies breach of any express or implied warranties of fitness or merchantability. Plaintiff's State Farm's damages were caused, contributed to, or enhanced by unforeseeable misuse or alteration of the product or other factors unknown at this time.

XI.

The Complaint fails to state a claim against Defendant upon which relief can be granted.

XII.

Plaintiff's cause of action is barred by the applicable statutes of limitations and repose.

XIII.

Paragraph XVIII in the Complaint violates the Federal Rules of Civil Procedure in respect to amendment of pleadings, and Defendant moves to strike it.

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

State Farm Fire & Casualty Insurance Company,	)	Civil No: A3-95-104
Plaintiff,	)	
v.	)	**AFFIDAVIT OF SERVICE**
Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation,	)	
Defendants.	)	

I hereby certify that pursuant to the Local Rules of the United States District Court for the District of North Dakota, on August 23, 1995, I caused to be served:

1. ANSWER OF UNITED DOMINION INDUSTRIES, INC. AND ITS SUBSIDIARY, THE MARLEY COMPANY, AND JURY DEMAND

By mailing true and correct copies to the following:

Daniel J. Dunn
Attorney at Law
P.O. Box 1238
Moorhead MN 56561-1238

/s/
James S. Hill

Subscribed and sworn to before me on August 23, 1995.

/s/
Carol Knudtson
Burleigh County, North Dakota
My Commission Expires: 5/22/98

UNITED STATES DISTRICT COURT
FOR THE STATE OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Chad Weisgram, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent,	)	Civil Action No: A3-95-103
Plaintiff,	)	
vs.	)	**AMENDED ANSWER OF UNITED DOMINION INDUSTRIES, INC. AND ITS SUBSIDIARY, THE MARLEY COMPANY AND JURY DEMAND**
Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation,	)	
Defendants.	)	

COMES NOW the Defendant, United Dominion Industries, Inc., a Delaware corporation, on its own behalf and on behalf of its wholly-owned subsidiary, The Marley Company, for its Amended Answer to Plaintiff's Complaint, states:

I.

Denies all allegations except those admitted, qualified, or otherwise explained in this Amended Answer.

II.

Admits The Marley company is a wholly-owned subsidiary of United Dominion Industries, Inc., a Delaware corporation, and states that Marley Electric Heating company, incorrectly designated as a Delaware corporation in the Complaint, is an unincorporated division of United Dominion.

III.

Admits the allegations in paragraphs I and VI of the Complaint, and admits that Defendant United Dominion Industries, Inc. ("United Dominion") through its division, Marley Electric Heating Company ("Marley Electric"), is in the business of designing, manufacturing, distributing, and selling electric baseboard heaters for use in North Dakota and elsewhere.

IV.

Admits that Plaintiff's decedent, Bonnie J. Weisgram, died as a result of a fire that occurred late on December 29, 1993, or early in the morning on December 30, 1993, at her home located at 2411 Flickertail Drive North in the City of Fargo, North Dakota.

V.

Admits that the electric baseboard heater described in paragraph IX of the Complaint was manufactured by Marley Electric.

VI.

The subject electric baseboard heater was free of design and manufacturing defects when it left the possession and control of Marley Electric, was reasonably fit for the purpose for which it was designed and intended, was of merchantable quality and was not unreasonably dangerous when prudently used for its intended purpose.

VII.

Denies that Plaintiff's damages were caused, contributed to, or enhanced by the subject electric baseboard heater and denies that said heater was the cause or origin of the fire described in the Complaint, or that it failed or malfunctioned as alleged in the Complaint.

VIII.

Bonnie Weisgram's fatal injuries were caused, contributed to, or enhanced by her own fault or negligence, including intoxication, drug use, and otherwise negligent or reckless conduct.

IX.

Any instructions for use, directions, or warning that may have been provided by the Defendant were reasonable and adequate.

X.

Plaintiff's decedent assumed the risk of injury and caused, contributed to, or enhanced plaintiff's damages by unforeseeable misuse or alteration of the product.

XI.

The subject electric baseboard heater was designed, manufactured, tested, and assembled with reasonable care and met or exceeded all applicable state and federal safety standards and all applicable industry standards.

XII.

The Complaint fails to state a claim against Defendant upon which relief can be granted.

XIII.

Plaintiff's cause of action is barred by the applicable statutes of limitations and repose.

WHEREFORE, Defendant requests the Plaintiff's Complaint be dismissed with prejudice, and that Defendant have its cost and disbursements according to law.

Dated this 30th day of August, 1995.

BY:/s/_____

James S. Hill
Christine A. Hogan
ZUGER KIRMIS & SMITH
Attorneys for Defendant
316 North Fifth Street
P.O. Box 1695
Bismarck, ND 58502-1695

Demand for Trial by Jury

Defendant demands a jury trial and requests a jury of twelve persons.

Dated this 30th day of August, 1995.

BY:/s/_____

James S. Hill
Christine A. Hogan
ZUGER KIRMIS & SMITH
Attorneys for Defendant
316 North Fifth Street
P.O. Box 1695
Bismarck, ND 58502-1695

STATE OF NORTH DAKOTA)
) ss. **AFFIDAVIT OF**
COUNTY OF BURLEIGH) **MAILING**

The undersigned, being first duly sworn, says that: I am a United States citizen, over the age of eighteen years on August 30, 1995, I served a copy of the attached

AMENDED ANSWER OF UNITED DOMINION INDUSTRIES INC. AND ITS SUBSIDIARY, THE MARLEY COMPANY AND JURY DEMAND

by placing a true copy in a postage paid envelope or envelopes addressed to each person named below, at the address stated below, which is the last known address of the addressee, and by depositing said envelope in the United States mail at Bismarck, North Dakota.

Paul A. Strandness
Attorney at Law
501B Butler Square
100 North Sixth Street
Minneapolis, MN 55403

Gregory L. Thompson
Attorney at Law
State Bank Center, Suite 202
3100 13th Avenue SW
P.O. Box 10247
Fargo, ND 58106-0247

Daniel J. Dunn
Cahill & Marquart
403 Center Avenue
P.O. Box 1238
Moorhead, MN 56561-1238

/s/ Lynette D. Sawatztse

Subscribed and sworn to before me
today, August 30, 1995.

/s/ Karol A. Cossette
Notary Public, State of North Dakota
My Commission Expires: 9-28-99

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

State Farm Fire & Casualty Insurance Company,	)	Civil No: A3-95-104
Plaintiff,	)	
v.	)	**ANSWER OF UNITED DOMINION INDUSTRIES, INC. AND ITS SUBSIDIARY, THE MARLEY COMPANY, AND JURY DEMAND**
Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation,	)	
Defendants.	)	

Defendant, United Dominion Industries, Inc., a Delaware corporation, on its own behalf and on behalf of its wholly-owned subsidiary, The Marley Company, for its Answer to Plaintiff's Complaint, states:

I.

Denies all allegations except those admitted, qualified, or otherwise explained in this Answer.

II.

Admits The Marley Company ("Marley") is a wholly-owned subsidiary of United Dominion Industries, Inc.,

("United Dominion"), a Delaware corporation, and states that Marley Electric Heating Company ("Marley Electric"), incorrectly designated in the Complaint as a Delaware corporation, is an unincorporated division of United Dominion.

III.

Admits the allegations in paragraphs I and V of the Complaint, and admits that Defendant United Dominion, through its division, Marley Electric, is in the business of designing, manufacturing, distributing, and selling electric baseboard heaters for use in North Dakota and elsewhere.

IV.

Admits that a fire occurred late on December 29, 1993, or early in the morning on December 30, 1993, at a home owned by Bonnie Weisgram, located at 2411 Flickertail Drive North in the City of Fargo, North Dakota.

V.

Admits that the electric baseboard heater described in paragraph IX was manufactured by Marley Electric.

VI.

The subject electric baseboard heater, when it left the possession and control of Marley Electric, was free of design and manufacturing defects, was reasonably fit for the purpose for which it was designed and intended, was of merchantable quality and was not unreasonably dangerous when prudently used for its intended purpose.

VII.

Denies that Plaintiff's State Farm's damages were caused, contributed to, or enhanced by the subject electric baseboard heater and denies that the heater was the cause or origin of the fire described in paragraph X of the complaint, and further denies that the heater malfunctioned or failed.

VIII.

Alleges that Plaintiff's State Farm's damages were caused, contributed to, or enhanced by the fault or negligence of decedent Bonnie Weisgram and of others over whom this Defendant had no control or right of control.

IX.

The subject electric baseboard heater was designed, manufactured, tested, and assembled with reasonable care and met or exceeded all applicable state and federal safety standards and all applicable industry standards.

X.

Denies breach of any express or implied warranties of fitness or merchantability. Plaintiff's State Farm's damages were caused, contributed to, or enhanced by unforeseeable misuse or alteration of the product or other factors unknown at this time.

XI.

The Complaint fails to state a claim against Defendant upon which relief can be granted.

XII.

Plaintiff's cause of action is barred by the applicable statutes of limitations and repose.

XIII.

Paragraph XVIII in the Complaint violates the Federal Rules of Civil Procedure in respect to amendment of pleadings, and Defendant moves to strike it.

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

State Farm Fire & Casualty Insurance Company,	)	Civil No: A3-95-104
Plaintiff,	)	
v.	)	**AFFIDAVIT OF SERVICE**
Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation,	)	
Defendants.	)	

I hereby certify that pursuant to the Local Rules of the United States District Court for the District of North Dakota, on August 23, 1995, I caused to be served:

1. ANSWER OF UNITED DOMINION INDUSTRIES, INC. AND ITS SUBSIDIARY, THE MARLEY COMPANY, AND JURY DEMAND

By mailing true and correct copies to the following:

Daniel J. Dunn
Attorney at Law
P.O. Box 1238
Moorhead MN 56561-1238

/s/
James S. Hill

Subscribed and sworn to before me on August 23, 1995.

/s/
Carol Knudtson
Burleigh County, North Dakota
My Commission Expires: 5/22/98

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Chad Weisgram, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent, Plaintiff, vs. Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation, Defendants.	)	Civil No: A3-95-103 **ORDER GRANTING MOTION TO CONSOLIDATE**

State Farm Fire & Casualty Insurance Company, Plaintiffs, vs. Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation, Defendants.	)	Civil No: A3-95-104

State Farm Fire & Casualty Insurance Company brought a motion for consolidation of Case Nos. A3-95-103 and A3-95-104 for purposes of trial. Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation, does not oppose the motion to consolidate. Chad Weisgram, individually, and on behalf of the heirs of Bonnie Jo Weisgram, decedent, has not filed a response to the motion to consolidate.

Based upon Rule 42(a) of the Federal Rules of Civil Procedure, the applicable case law and the positions and arguments of the parties, the Court hereby grants State Farm's motion to consolidate Case Nos. A3-95-103 and A3-95-104 for trial purposes.

Dated this 12th day of February, 1996.

/s/
Rodney S. Webb
Chief Judge of U. S. District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Chad Weisgram, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent,	)	Civil No: A3-95-103
Plaintiff,	)	
vs.	)	**PRETRIAL STATEMENT**
Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation,	)	
Defendants.	)	

State Farm Fire & Casualty Insurance Company,	)	Civil No: A3-95-104
Plaintiffs,	)	
vs.	)	
Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation,	)	
Defendants.	)	

A final pretrial conference was held on the 2nd day of May, 1997.

Appearing for the parties as counsel were: Dan Dunn for Plaintiff, State Farm; Paul Strandness for Plaintiff, Weisgram; James S. Hill and Christine Hogan for Defendant, Marley Company.

1. Exhibit List: A list of the exhibits to be offered by the parties is attached to this Order, including a "will offer" or "may offer" designation.

2. Foundation of Exhibits: Foundation for the following exhibits has been stipulated or waived:

Plaintiffs waive foundation for defendant's exhibits, except nos. 238, 239, 246, 407, and 426.

Plaintiffs do not waive foundation with respect to demonstrative and illustrative exhibits referred to in Exhibit List.

Defendant waives foundation for plaintiff's exhibits, excepting exhibit nos. 141, 152, and 194-205.

3. Uncontroverted Facts: The parties have agreed that the following may be accepted as established facts for purposes of this case only: A fire occurred at the Bonnie Weisgram home on December 30, 1993. Bonnie Weisgram died as a result of that fire.

4. Controverted and Unresolved Issues: The issues remaining to be determined and unresolved matters for the Court's attention are:

a. Plaintiffs allege that the fire was caused by a defective and unreasonably dangerous baseboard heater manufactured by BERKO, a predecessor of

Marley Company. Defendants deny that the baseboard heater caused the fire.

b. The parties have brought the following motions, which are currently pending response from the other party:
   1. Defendant's motion to preclude John Gorman from testifying on the ground that plaintiffs failed to comply with Rule 26;
   2. Plaintiff's motion to limit testimony by Dr. Paul Larsen;
   3. Plaintiff's motion to compel production of CPSC documents;

c. Defendant anticipates filing the following pre-trial motions:
   1. Rule 702 motion to preclude Ralph Dolence, John Gorman, and Sandy Lazarowicz from testifying on ground that their opinions are not grounded in science or engineering;
   2. Motion to dismiss breach of warranty claims on ground that statute of limitations for warranties has expired under UCC;
   3. Motion in limine to preclude reference to CPSC investigation of unrelated model Marley heater and to preclude any reference to Marley recall of unrelated model heater;
   4. Motion to dismiss warnings claim, manufacturing defect claim and design defect claim based on plaintiffs failure to comply with Rule 26;

d. Plaintiff anticipates filing the following pre-trial motions:
   1. Rule 702 motion to preclude testimony of Russell Ogle and Robert Carbonara on the ground that their opinions are not based on science or engineering; and

   2. Motion to exclude testimony of Richard Moore based upon late disclosure of opinions and supporting documentation.

5. All witnesses, other than experts, to be called to testify by plaintiffs, except those who may be called for rebuttal purposes only, are:

WILL CALL:

Chad Weisgram, Fargo, ND
Ryan Weisgram, Fargo, ND
Merle Higgs, 2531 Willow Road, Fargo, ND
Ila Law, Fargo, ND
Karen Eisenstadt, Fargo, ND
Dr. Ron E. Wiisanan, Deputy Coroner, Cass County, Fargo, ND
Dr. Robert F. Startz, Pathologist, Dakota Hospital, Fargo, ND
Cpt. Jerry Splitt, Fargo Fire Department, Fargo, ND
Joe Locnikar, off duty fireman neighbor, Fargo, ND
Fireman Roger Thorseth, Fargo Fire Department, 637 NP Avenue, Fargo, ND
Fireman Marshall Forness, Fargo Fire Department, 637 NP Avenue, Fargo, ND
Gene Okerlund, Music Director, Fargo Schools, Fargo, ND
Ron Messelt, 3118 Edgewood Drive, Fargo, ND
Captain D.E. Freeman, Fargo Fire Department Fargo, ND

MAY CALL:

Joe Weisgram, Fargo, ND
Leslie Tuftee, Sioux Falls, SD
Craig Hanson, Fargo, ND
Dr. John R. Baird, County coroner, Cass County, Fargo, ND

Dr. Robert F. Startz, Pathologist, Dakota Hospital, Fargo, ND
Ambulance Attendant Todd Horhut and J. Gross and G. Casey
Sgt. Steve Link, Fargo Fire Dept., Fargo, ND
Robert Keller, 2308 Flickertail Drive N, Fargo, ND
Gary Anderson, Fargo Police Officer No. 044
Catherine Ferguson, Fargo, ND, Owner of next-door duplex
Ted Cyptar, representative, agent or employee of Marley Electric
Employees, officers and/or agents of Gary's Electric, Fargo, ND
Mary Larson, Property Management agent Fargo, ND

All witnesses, other than experts, to be called to testify by defendant, except those listed in the preceding paragraph as expected to be called by the plaintiffs and except those who may be called for rebuttal purposes only, are:

MAY CALL:

Donald Clapp, Fargo, ND, original owner of Weisgram property
Kathryn Fergussen, Fargo, ND, owner of next-door duplex
John Fritz, Fritz Electric Company, Fargo, ND, installed subject heater in Weisgram home
Michael Loescher, Director of Engineering, Sunne Controls, Portland, OR, representative of thermostat manufacturer

It is understood that except upon a showing of good cause, no witness whose name and address does not appear

herein shall be permitted to testify over objection for any purpose except rebuttal.

6. Expert Witnesses:

The expert witnesses to be called by plaintiffs are:

WILL CALL:
John Gorman
Lowell Van Berkom
Dr. Ron E. Wiisanan, Deputy Coroner, Cass County, Fargo, ND

MAY CALL:

Dr. Robert F. Startz, Pathologist, Dakota Hospital, Fargo, ND
Dr. John R. Baird, County Coroner, Cass County, Fargo, ND

WILL CALL:
Ralph Dolence
Dolence Electric Technical Consultants
P.O. Box 5207
Willowick, OH 44095
Fire cause and origin expert, Ralph Dolence will testify that the baseboard heater in Bonnie Weisgram's home caused the fire at issue.

WILL CALL:
Sandy J. Lazarowicz
IQT Group Inc.
6363 Michael Drive
Brook Park, OH 44142-3813
Metallurgist

Sandy Lazarowicz will testify that the baseboard heater in Bonnie Weisgram's home caused the fire at issue

The expert witnesses to be called by defendant are:

WILL CALL:

a. Michael R. Phy, Senior Engineering Specialist, Product Safety, Marley Electric Heating
b. Dr. Russell Ogle, Chemical Engineer, Packer Engineering
c. Gordon Wells, Engineer, Therm-O-Disc, Inc.
d. Vincent Acampora, Mechanical Engineer, C & K Components, Inc.
e. Richard Moore, Physicist, Product Performance Manager, C & K Components, Inc.

MAY CALL:

f. Matthew Miner, Engineer, Energy Converters Inc.
g. Dr. Robert Carbonara, Metallurgy, S.E.A., Inc.
h. Dr. Alphonse Poklis, Toxicology, Medical College of Virginia.
i. Dr. Paul Larsen, Medical Doctor, previously listed in plaintiff's expert disclosure, plaintiff's treating physician.

7. Discovery Materials:

Plaintiff's plan to offer:

Marley Company's Response to State Farm's Request for Admission
Defendant's Response to Plaintiffs Interrogatories dated 12/1/95
Defendant's Response to Plaintiff s Interrogatories (Set II) dated 12/12/96
Defendant's Disclosure of Expert Witness Reports dated 5/31/96

Defendant's plan to offer:

Defendant does not plan to offer any discovery materials at this time.

8. Trial of this case will be by jury.

9. Length of trial is estimated to be 10 days.

10. The parties will not voluntarily waive their rights to proceed before a district judge.

ORDER

The foregoing Pretrial Statement is adopted as the order of the Court.

DATED this 15th day of May, 1997.

BY THE COURT:

/s/
Karen K. Klein
United States Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Chad Weisgram, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent, Plaintiff, vs. Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation, Defendants.	)	Civil No: A3-95-103 **REQUEST FOR HEARING TO EXCLUDE THE EXPERT TESTIMONY OF JOHN GORMAN, RALPH DOLENCE, AND SANDY LAZAROWICZ UNDER RULE 702**
State Farm Fire & Casualty Insurance Company, Plaintiffs, vs. Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United	)	Civil No: A3-95-104

Dominion Industries, Inc., a)
Delaware corporation,)
)
Defendants.)

Defendant Marley requests that this court hold a hearing under Federal Evidence Rule 104 on the preliminary question of whether plaintiff's experts Dolence, John Gorman, and Sandy Lazarowicz should be allowed to testify on the ground that their opinions are not based on science or engineering, are untested, and are speculative. Under *Daubert v. Merill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993),* the United State Supreme Court held that there has to be a threshold level of scientific merit to expert opinion testimony in product liability trials. In this case, the proposed expert testimony by plaintiff's technical experts has no foundation of scientific methodology and no record of valid, repeatable testing for the opposing party to examine, test, and hold up to the light. Under these circumstances, this court should reject the testimony at the threshold under Rule 702.

DATED this 15th day of May, 1997.

Respectfully submitted by:

ZUGER KIRMIS & SMITH
Attorney for Defendants
316 North 5th Street, 6th Floor
P.O. Box 1695
Bismarck, N.D. 58502
Phone: (701) 223-2711

By /s/ Christine Hogan
James S. Hill (#3158)
Christine A. Hogan (#3259)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Chad Weisgram, individually)
and on behalf of the heirs of)
Bonnie Jo Weisgram,)
decedent,)
)
Plaintiff,)
)
-vs-) CIVIL NO. A3-95-103
)
Marley Company, a Delaware)
corporation, and its subsidiary,)
Marley Electric Heating)
Company, a Delaware)
corporation, and United)
Dominion Industries, Inc.,)
a Delaware corporation,)
)
Defendants.)

State Farm Fire & Casualty)
Insurance Company,)
)
Plaintiffs,)
)
-vs-) CIVIL NO. A3-95-104
)
Marley Company, a Delaware)
corporation, and its subsidiary,)
Marley Electric Heating)
Company, a Delaware)
corporation, and United)

Dominion Industries, Inc., a)
Delaware corporation,)
)
Defendants.)

ORDER

Before the court are several motions, each of which will be addressed in turn.

The first motion before the court is plaintiff Weisgram's motion in limine to exclude the opinion of Dr. Paul D. Larsen regarding the cause of the decedent's death (docket #29). Plaintiff argues that Dr. Larsen, who was the decedent's treating physician, is not qualified to render forensic opinions regarding the cause of decedent's death. Defendants respond by arguing that Dr. Larsen is qualified to render such opinions. The court notes that Dr. Larsen is not on the "Will Call" list of witnesses in the final pretrial statement (docket #52). Therefore, a ruling on this motion will be reserved until such time as it is necessary for the court to consider it.

The next motion before the court is defendants' motion in limine to prohibit duplicate arguments and examinations by the separate plaintiffs (docket #47). The thrust of the defendants' argument is that plaintiff State Farm is not entitled to separately examine witnesses and make arguments because: 1) the cases of each of the plaintiffs were consolidated upon State Farm's motion; 2) State Farm holds a subrogation interest only and the amount of that interest has been stipulated to by the parties; and 3) State Farm makes no allegations separate from the Weisgrams and its right of recovery is therefore dependent on the recovery of the Weisgrams. The plaintiffs respond by noting that motions in limine were required to be filed 30 days before trial and the defendants' motion, filed less than one week before trial, is late and therefore should be denied. The court finds that the

defendants' motion is tardy and is therefore **DENIED**. However, pursuant to Rule 611 of the Federal Rules of Evidence, the court will not allow plaintiffs to conduct repetitive examinations of witnesses. Furthermore, the court will restrict the total time for opening statements at one hour for both of either will call or may call during this trial. Specifically, the plaintiffs have jointly listed a total of seven experts and defendants have listed a total of nine experts. It is the court's initial impression that sixteen experts are unnecessary and will likely be repetitive. It is the court's hope that the parties will be selective in their presentation of expert testimony as unduly repetitious testimony is undesirable and will not be permitted.

The final motion before the court is defendants' motion and request for a hearing to exclude the testimony of John Gorman, Ralph Dolence, and Sandy Lazarowicz pursuant to Rule 702 of the Federal Rules of Evidence. According to defendants, the opinions of the named experts are not based on science or engineering, are untested, and are speculative. Therefore, according to defendants, the opinions do not meet the standard of admissibility outlined in Rule 702 and Daubert v. Merill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The court is of the opinion that the defendants' motion is untimely and is therefore **DENIED**. The court will, however, make Rule 702 determinations during trial as testimony and qualifications of experts are presented and will entertain qualification challenges and requests for Daubert hearings upon proper objection.

IT IS SO ORDERED.

Dated this 20th day of May, 1997.

/s/
Rodney S. Webb, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Chad Weisgram, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent,	)	
Plaintiff,	)	
-vs-	)	CIVIL NO. A3-95-103
Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation,	)	
Defendants.	)	

State Farm Fire & Casualty Insurance Company,	)	
Plaintiffs,	)	
-vs-	)	CIVIL NO. A3-95-104
Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware	)	

corporation, and United)
Dominion Industries, Inc.,)
a Delaware corporation,)
)
Defendants.)

INSTRUCTIONS TO THE JURY

FINAL INSTRUCTIONS

The Honorable Rodney S. Webb
United States District Court

May 29, 1997

Final Instructions

Table of Contents

Instruction No.	Description
1.	Introduction
2.	Find
3.	Presumption
4.	Failure to Produce Evidence
5.	Statement of Plaintiff's Claims
6.	Statement of Defenses and Issues Tendered by Defendants
7.	Strict Products Liability
8.	Scienter Not at Issue
9.	Proof of Defect
10.	Manufacturer Not Guarantor
11.	Rebuttable Presumption Against Defects
12.	Unforeseeable Misuse
13.	Contributory Negligence
14.	Presumption of Ordinary Care

15. Proximate Cause

16. Comparative Fault

17. North Dakota Statue on Comparative Fault

18. Consideration of Damages

19. Damages Defined

20. Burden of Proving Damages

21. Adequate Compensation

22. Exemplary Damages Not Allowed

23. Wrongful Death

24. Measure of Damages - Wrongful Death

25. Property Damage Paid by State Farm

26. Damages For Future Detriment Reduced to Present Worth

27. Interest on Damages

28. Quotient Verdict Not Allowed

29. Jury Deliberations

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Chad Weisgram, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent,	)	
Plaintiff,	)	
-vs-	)	CIVIL NO. A3-95-103
Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation,	)	
Defendants.	)	

State Farm Fire & Casualty Insurance Company,	)	
Plaintiffs,	)	
-vs-	)	CIVIL NO. A3-95-104
Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United	)	

Dominion Industries, Inc.,)
a Delaware corporation,)
)
Defendants.)

FINAL INSTRUCTIONS

Jury Instruction 1

Introduction

MEMBERS OF THE JURY:

Now that you have heard the evidence, it becomes my duty to give you the final instructions concerning the law applicable to this case.

It is your duty as jurors to follow the law as stated in these instructions, as well as those I gave you earlier, and to apply the rules of law so given to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon anything but the evidence in the case and the law as I give it to you.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law, as given in these instructions.

These final instructions, as well as those I gave you before you began hearing evidence, are in writing and will be available to you in the jury room. Remember, though, all

instructions I have given you during the course of the trial, whether in writing or not, must be followed.

Jury Instruction 2

FIND

When I say in these instructions that a party has the burden of proof on any proposition, or use the expression "if you find," or "if you decide," I mean you must be persuaded, considering all the evidence in the case, that the proposition is more probably true than not true.

Jury Instruction 3

PRESUMPTION

In these instructions I will refer to presumptions.

A presumption is an inference of the existence of a fact not certainly known, which the law expressly directs to be drawn from particular known facts or circumstances. If facts giving rise to a presumption are established by credible evidence, the presumption substitutes for evidence of the existence of the presumed fact and governs you in finding the facts unless you find from credible evidence that the presumed fact does not exist, in which event the presumption is rebutted and ceases to operate.

A party against whom a presumption is directed has the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

Jury Instruction 4

FAILURE TO PRODUCE EVIDENCE

If a party has failed to offer evidence under that party's control which is (1) available to the party by the exercise of reasonable diligence, (2) the evidence was not equally available to the adverse party, (3) a reasonably prudent person under the same or similar circumstances would have offered the evidence if the person had reason to believe it to be favorable, and (4) no reasonable explanation for that failure is given, you may infer that the evidence would have been unfavorable to that party.

Jury Instruction 6

STATEMENT OF DEFENSES AND ISSUES TENDERED BY DEFENDANTS

Defendants deny that the electric baseboard heater was defective or unreasonably dangerous by virtue of its design, or otherwise, when it left their hands.

Defendants further contend that the fire in the Weisgram home was caused by a means other than the heater and that Bonnie Weisgram was at fault for her own death. The defendants contend that the sole cause of the fire in the Weisgram home was a cigarette dropped between sofa cushions. As indicated to you in Preliminary Instruction No. 5, the defendants have the burden of proving their defenses by a "preponderance of the evidence."

I will now instruct you on the law as it applies to the plaintiff's claims, and the defenses raised by the defendants.

STRICT PRODUCTS LIABILITY

A person who manufactures a product that is defective and unreasonably dangerous is liable to the user or consumer of the product for physical harm to the person resulting from any ordinary use of the product for which it was designed, or which could have been reasonably anticipated, by the manufacturer if the manufacturer: (1) is engaged in the business of manufacturing the product, and (2) expects the product to be used by the user or consumer without substantial change in the condition in which it was sold.

This rule of strict liability applies even though the manufacturer exercised all possible care in the manufacture of the product and the user or consumer did not buy the product from or enter into any contractual relation with the manufacturer.

Before you can find the manufacturer liable, you must find that the product in question was defective when it left the possession of the manufacturer and that it was unreasonably dangerous to the plaintiff.

A defective product is unreasonably dangerous if any ordinary use of the product for which it was designed, or use that was anticipated by the manufacturer, creates a substantial risk of physical harm to the user or consumer beyond any danger that would be contemplated by the ordinary and prudent buyer, consumer or user of the product in that community considering the product's characteristics, propensities, risks, dangers and uses, together with an actual knowledge, training or experience possessed by that particular buyer, user or consumer.

PROOF OF DEFECT

Conclusive proof is not necessary to show the existence of a product defect. A product defect can be shown by circumstantial evidence. It is not enough to show that an accident or mishap occurred to establish a defect, but the nature of the defect need not be precisely established. A defect may be inferred from proof that the product did not perform as intended by the manufacturer. However, a product is not defective or unreasonably dangerous merely because it is possible to be injured while using it.

Jury Instruction 10

MANUFACTURER NOT GUARANTOR

The manufacturer of a product is not a guarantor that nobody will get hurt in using the article. What the manufacturer is required to do is to make a product which is free from defective and unreasonably dangerous conditions.

Jury Instruction 12

UNFORESEEABLE MISUSE

If a manufactured product is defective in design and unreasonably dangerous, and that product is misused, the manufacturer's or seller's fault is diminished by the unforeseeable misuse. This is true only if:

1) a person uses the product in a manner the manufacturer or seller could not be expected to anticipate or provide against in the manufacture or sale of the product, and

2) the misuse of the product is a proximate cause of the damages.

CONTRIBUTORY NEGLIGENCE
(In General)

Everyone has a duty to exercise reasonable care for her own protection and safety and, in doing so, to make reasonable use of her faculties to avoid injury to herself. If she fails to do so, she is guilty of negligence. Accordingly, negligence of the decedent (Bonnie Weisgram) is "contributory negligence" if it concurs or combines with negligence of the defendants so that the negligence of all is a proximate cause of the decedent's injury, although the negligence of the defendants may have been different in degree or its effect.

PRESUMPTION OF ORDINARY CARE

In a case, such as this, where an individual has suffered death by accident and there is no eyewitness to the event, the decedent is presumed, out of regard for the natural instinct of self-preservation, to have exercised ordinary care at the time of the mishap. This presumption, like any other presumption, substitutes for evidence unless it is rebutted.

Jury Instruction 15

PROXIMATE CAUSE

Before a person can be held responsible for fault, that fault must have been a proximate cause of the injury.

A proximate cause is a cause which, in natural and continuous sequence, produces the injury and without which the injury would not have occurred. It is a cause which had a substantial part in bringing about the injury either immediately or through happenings which follow one another.

There may be more than one proximate cause of the injury. The fault of two or more persons may contribute to cause the injury, and in such case each person's fault is regarded as a proximate cause.

Jury Instruction 16

COMPARATIVE FAULT

The law requires that fault be apportioned among those parties you have found to be at fault in causing the plaintiffs' damages.

The determination of fault, and the allocation of fault will be done through a series of questions that you will be asked to answer on the verdict form that accompanies these instructions. For this purpose, defendants' fault, if any, consists of strict liability for product defect.

Plaintiffs' decedent's fault may consist of contributory negligence, misuse of a product, and/or failure to exercise reasonable care to avoid an injury.

If, by your answers to the questions on the verdict form, you have determined that two or more persons are at fault and that their fault was a proximate cause of plaintiffs' damages, you must apportion fault among them. Plaintiffs' decedent's contributory fault of 50% or more precludes any recovery.

NORTH DAKOTA STATUTE ON COMPARATIVE FAULT

32-03.2-02. Contributory fault does not bar recovery in an action by any person to recover damages for death or injury to person or property unless the fault was as great as the combined fault of all other persons who contribute to the injury, but any damages allowed must be diminished in proportion to the amount of contributing fault attributable to the person recovering. The court may, and when requested by any party, shall direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each person, whether or not a party, who contributed to the injury. The court shall then reduce the amount of such damages in proportion to the amount of fault attributable to the person recovering.

CONSIDERATION OF DAMAGES

If, adhering to these instructions, you find that plaintiffs are entitled to a verdict against the defendants, it will then be your duty to award the plaintiffs such damages as you find proportionate to the detriment suffered.

The question of damages is an entirely distinct and different question from the question of liability, and you must not consider the question of damages in this case until you have determined that the defendants are liable for the damages, if any, claimed by the plaintiffs. That the court gives instructions on damages or that counsel for either party may have discussed the subject is not to be taken by you as any intimation by the court or as any admission by a party of liability for the damages claimed by the other party.

Jury Instruction 19

DAMAGES DEFINED

Every person who suffers injury from a wrongful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages. Detriment is a loss or harm suffered in person or property.

Damages may be awarded for detriment resulting after the commencement of an action.

Jury Instruction 20

BURDEN OF PROVING DAMAGES

Even though the liability of the defendants may have been established, you cannot, assess damages against them unless the plaintiffs have satisfied the burden of proof with respect to their damages, if any. That is to say, the burden rests upon the plaintiffs to prove the elements of their damages, if any, by the greater weight of the evidence.

Jury Instruction 22

EXEMPLARY DAMAGES NOT ALLOWED

You may not include in any award of damages any sum for the purpose of punishing the defendants or to serve as an example or warning to others. The law does not authorize exemplary damages, sometimes referred to as punitive damages, in this action.

Jury Instruction 23

WRONGFUL DEATH

If the death of a person is proximately caused by a wrongful act, neglect, or default of another, and the act, neglect, or default is such as would have entitled the person injured, if death had not ensued, to maintain an action and recover damages in respect thereof, the wrongdoer who would have been liable to the decedent, if death had not ensued, is liable for damages to the surviving children.

MEASURE OF DAMAGES - WRONGFUL DEATH

In an action for damages for wrongful death, the measure of the damages to be awarded is the amount you find proportionate to the injury resulting from the death to the persons entitled to the recovery - in this case Bonnie Weisgram's sons. A substantial loss will be presumed. Damages should be adequate to fairly compensate for the loss or detriment suffered by the surviving heirs which was proximately caused by the negligence or other wrongdoing of the defendants, whether or not the loss or detriment could have been anticipated. Damages in any case must be reasonable.

In an action, such as this, by surviving children for the death of their mother, compensation may be awarded for economic damages, which are damages arising from medical expenses and medical care, loss of earnings and earning capacity, loss of income or support, burial costs, property damage, and other monetary losses.

You may also award non-economic damages which in this case may include mental anguish, emotional distress, and loss of society and companionship. In determining non-economic damages, you may consider the loss the children have suffered, and will suffer in the future, by being deprived of the comfort, society, protection and companionship of their mother. You may also consider and award damages for mental anguish and grief suffered by the surviving children up to the present time, and the mental anguish and grief they will suffer in the future because of the death of their mother.

In weighing these matters, you may consider the age of Bonnie Weisgram, and of her surviving children, the state of health and physical condition of Bonnie Weisgram and of her

children as it existed at the time of and immediately before death; her station in life; her expectancy of life; Bonnie Weisgram's disposition; and all other facts in evidence that throw light upon the question of pecuniary loss.

Jury Instruction 25

PROPERTY DAMAGE PAID BY STATE FARM

Economic damages for property lost paid by State Farm as a result of the Weisgram fire, if they are to be awarded, have been stipulated and agreed to be the sum of $100,575.42. In the event you decide to award any damages, this sum should be inserted on the proper line of the verdict form.

Jury Instruction 26

DAMAGES FOR FUTURE DETRIMENT REDUCED TO PRESENT WORTH

In computing the damages for pecuniary loss or detriment which, by reason of the injury, the plaintiffs will suffer in the future, you should take into account the present value of that future loss or detriment and reduce the gross amount of the damages to its present worth. The present worth of damages for future loss or detriment is the sum which, with interest at rates that may reasonably be expected, will equal the amount of the future loss or detriment at the time it occurs.

Jury Instruction 27

INTEREST ON DAMAGES

If you return a verdict awarding damages to the plaintiffs, interest thereon at a rate not greater than six percent per year from the date of the wrongdoing to the date of your verdict may be awarded in your discretion.

Jury Instruction 28

QUOTIENT VERDICT NOT ALLOWED

If you award damages to the plaintiffs, you must avoid using a "quotient" method by which the jurors agree in advance to have each juror write down the amount he or she considers to be a proper award, adding the amounts together, and then dividing the total amount by the number of jurors and making the result the amount to be awarded as damages. Likewise, any other method by which the jurors agree in advance to "split the difference" or to "strike a happy medium" between divergent estimates of value must be avoided. Those methods are illegal and must not be used or considered by you in arriving at any award of damages in this case.

* * *

of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and the change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are the judges -- judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Sixth - Verdict Form

A verdict form has been prepared for your use. You will take this form to the jury room with you, and when you have reached unanimous agreement as to each of the pertinent findings on the verdict form, you will have your foreperson sign and date it. You will then inform the bailiff, who will in turn inform me, that you have reached a verdict. When the bailiff returns to escort you back into the courtroom, the foreperson will carry the signed and dated verdict form in with him or her.

You will now take this case, try it fairly and impartially between the parties, and return such verdicts as are warranted under all the evidence and these instructions.

Plaintiffs' Joint Requested Instructions

Prelim 1.	Given - Prelim #1
Final 1.	Given - Final #1
2.	Given - Prelim #3
3.	Given - Prelim #4
4.	Given - Prelim #13
5.	Given - Prelim #14
6.	Given - Prelim #15
7.	Given - Prelim #16
8.	Given - Final #2
9.	Covered - Fin #1 and Pre #2
10.	Covered - Prelim #6
11.	Given - Prelim #17
12.	Given - Prelim #11
13.	Given - Prelim #9
14.	Covered - Final #5

15.	Given - Final #15
16.	Given - Final #9
17.	Rejected
18.	Given - Final #7
19.	Given - Final #8
20.	Rejected
21.	Rejected
22.	Given - Final #4
23.	covered - Final #24
24.	Given - Final #28
25.	Given - Final #30
Verdict Form	Covered

* * *

31.	Covered - Final 121 & 2
32.	Covered - Final #24
33.	Given - Final #26
34.	Given - Final #29
35.	Covered - Final #7
Verdict Form	Covered
Amended 32.	Rejected

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Chad Weisgram, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent,

Plaintiff,

-vs-) CIVIL NO. A3-95-103

Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation,

Defendants.

State Farm Fire & Casualty Insurance Company,

Plaintiffs,

-vs-) CIVIL NO. A3-95-104

Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation,

Defendants.

VERDICT FORM

We, the jury in the above-entitled action, for our special verdict, answer the questions submitted to us by the court as follows:

LIABILITY

1. Did the fire in the Weisgram home result from the electric baseboard heater?

Yes X No ___

Note: If your answer is "Yes," go on to question 2. If your answer is "No," please have the foreperson sign the verdict form and return it to the bailiff.

2. Was the electric baseboard heater manufactured and sold by the Marley Company defendants in a defective and unreasonably dangerous condition at the time it was sold?

Yes X No ___

Note: If your answer is "Yes," go on to question 3. If your answer is "No," please have the foreperson sign the verdict form and return it to the bailiff.

3. Was the defective condition of the electric baseboard heater manufactured and sold by the Marley Company defendants a proximate cause of Bonnie Weisgram's death?

Yes X No ___

Note: If your answer is "Yes," go on to question 4. If your answer is "No," please have the foreperson sign the verdict form and return it to the bailiff.

4. Was Bonnie Weisgram at fault for her own injury and death? (You should consider only conduct on Bonnie Weisgram's part which may have contributed to her injuries resulting from the fire caused by the electric baseboard heater. Do not consider conduct on Bonnie Weisgram's part which may be related to an alternate cause of the fire.)

Yes ___ No X

Note: If your answer is "Yes," go on to question 5. If your answer is "No, " go on to question 6.

5. Was Bonnie Weisgram's fault a contributing proximate cause of her death?

Yes ___ No X

ALLOCATION OF FAULT

6. Taking the combined fault which contributed to Bonnie Weisgram's death as 100 percent, what percentage do you attribute to:

A. Marley Company defendants 100%

B. Bonnie Weisgram 0%

Total 100%

Note: You may only assign a percentage to Bonnie Weisgram if you answered "Yes" to questions 4 and 5.

DAMAGES

7. Economic damages: $ 100,575.42
(For example burial expenses)

Property damages: $
(Economic damages in the form of property damage paid by State Farm have been agreed to be $100,575.42, which you should include as a part of the economic damages if they are awarded.)

Noneconomic damages: $ 500,000.00

TOTAL: $ 600,000.42
(The total should reflect all of the damages incurred, regardless of percentage of fault. The court will reduce the damages to reflect fault.)

8. Should plaintiffs be awarded interest on the damages?

Yes ___ No X

Note: If your answer is "Yes," go on to question 9. If your answer is "No," please have the foreperson sign the verdict form and return it to the bailiff.

9. What rate of interest should be used (subject to a maximum of 6%)?

____%

Dated this 29th day of May, 1997, at Fargo, North Dakota.

/s/ Kevin M. Bakke
Foreperson of the Jury

United States District Court
District of North Dakota Southeastern Division

CHAD WEISGRAM, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent,

JUDGMENT IN A CIVIL CASE

v.

Case Number: A3-95-103

MARLEY COMPANY, a Delaware Corporation, and its subsidiary, MARLEY ELECTRIC HEATING COMPANY, a Delaware Corporation, and UNITED DOMINION INDUSTRIES, INC., a Delaware Corporation,

---

STATE FARM FIRE & CASUALTY INSURANCE COMPANY,

v.

Case Number: A3-95-104

MARLEY COMPANY, a Delaware Corporation, and its subsidiary, MARLEY ELECTRIC HEATING COMPANY, a Delaware Corporation, and UNITED DOMINION INDUSTRIES, INC., a Delaware Corporation,

[X] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED pursuant to the Jury Verdict returned on May 29, 1997, Plaintiff Chad Weisgram, decedent, have judgment against Defendants in the sum of $500,000.00, without interest.

IT IS FURTHER ORDERED AND ADJUDGED THAT Plaintiff State Farm Fire and Casualty Insurance Company, have judgment against Defendants in the sum of $100,575.42, without interest.

June 17, 1997 — Edward J. Klecker, Clerk — Date

/s/
By Deputy Clerk, Darlene J. Jose

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Chad Weisgram, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent, Plaintiff, vs. Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation, Defendants.	)	Civil No: A3-95-103 **DEFENDANT MARLEY'S MOTION FOR JUDGMENT AS A MATTER OF LAW, OR, ALTERNATIVELY, FOR NEW TRIAL**

State Farm Fire & Casualty Insurance Company, Plaintiffs, vs. Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United	)	Civil No: A3-95-104

Dominion Industries, Inc.,)
a Delaware corporation,)
)
Defendants.)

Motion for judgment notwithstanding the verdict

Defendant Marley renews the motion made at the close of all the evidence and moves the Court, pursuant to Rule 50(a), F.R.Civ.P., to set aside the verdict entered in the above entitled action on May 29, 1997 and the judgment entered on June 17, 1997 and to enter judgment in its favor in accordance with the motion for directed verdict made at the close of all the testimony, on the ground that the evidence was insufficient to support the verdict as a matter of law, as set forth with more particularity in the accompanying brief.

Alternative motion for new trial

In the alternative, Marley moves the court pursuant to Rule 59, F.R.Civ.P. to set aside the verdict and judgment and grant a new trial for any or all of the following reasons:

1. The verdict is contrary to law;
2. The verdict is against the weight of the evidence;
3. The honorable court erred during the course of the trial in several respects prejudicial to Marley, including:
   a. The court should have excluded expert opinion testimony from Dan Freeman because he was listed as a fact witness and not as an expert on the pretrial order;
   b. Federal Evidence Rule 702 and the U.S. Supreme Court's holding in *Daubert* required the trial court to exercise its gate keeping authority to exclude expert opinion testimony

from Dan Freeman, Ralph Dolence, and Sandy Lazarowicz;

   c. The court's instruction on circumstantial evidence was contrary to North Dakota law and was prejudicial error;
   d. The court's examination of a defense expert who was also the company representative crossed the bounds of judicial propriety, was grounds for mistrial, was highly prejudicial, and was plain error;
   e. The court erred in excluding photographs of defense expert's testing, which went to the heart of plaintiff's case; and
   f. The court's admission of character evidence on the issue of damages in a wrongful death action was contrary to North Dakota statutory and cm law and was prejudicial error;
   g. The court's instruction on the measure of damages for wrongful death was contrary to North Dakota law and was prejudicial error.

These grounds for the motion are more fully described in the accompanying supporting brief

Defendant respectfully requests that the court set this matter for hearing and grant judgment as a matter of law, or, alternatively grant Marley a new trial. Oral argument is requested.

DATED this 27th day of June, 1997.

Respectfully submitted by:

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By /s/ Christine Hogan
James S. Hill (#3158)
Christine A. Hogan (#3259)

Memorandum and order denying motion for judgment as a matter of law and for new trial included at A-28 in Joint Petition for Writ of Certiorari

Eighth Circuit Panel Majority Opinion and Dissent of Judge Bright included at A-1 in Joint Petition for Writ of Certiorari

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-3735

Chad Weisgram, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent, Appellee, v. Marley Company, a Delaware Corporation and its subsidiary, Marley Electric Heating Company, a Delaware Corporation; United Dominion Industries, Inc., a Delaware Corporation, Appellants. --- State Farm Fire & Casualty Insurance Company, Appellee, v. Marley Company, a Delaware Corporation; Marley Electric Heating Company, a Delaware Corporation;	*	Appeal from the United States District Court for the District of North Dakota.

United Dominion Industries, Inc., a Delaware Corporation, *

Appellants. *

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is vacated and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

February 23, 1999

A true copy.

ATTEST: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

In The United States Court of Appeals For The Eighth Circuit

No. 97-3735

Chad Weisgram, et al.

and

State Farm Fire & Casualty Insurance Company,

Plaintiffs/Appellees,

vs.

Marley Company, et al.,

Defendants/Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

APPELLEES' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITES iii

INTRODUCTION 1

POINTS OF FACT, AS OVERLOOKED OR MISAPPREHENDED BY THE PANEL MAJORITY 1

Evidence of Cause & Origin of the Fatal Fire 1

Evidence of Design Defect 5

ARGUMENT 7

I. Plaintiffs' Petition Should be Granted to Secure and Maintain the Uniformity of the Court's Decisions Relative to the Application of Substantive State Law Under the *Erie* Doctrine, a Question of Exceptional Importance 7

A. Under the *Erie* Doctrine the Panel Majority is Required to Apply the Law as Defined by the North Dakota Supreme Court, Yet it Ignored North Dakota Law Relative to Plaintiffs' Burden of Proof 7

B. The Panel Majority's Rendition of North Dakota Law Relative to Plaintiffs' Burden of Proof is Clearly Erroneous, Fundamentally Affecting Plaintiffs' Substantive Rights 8

II. Plaintiffs' Petition Should be Granted to Secure and Maintain the Uniformity of the Court's Decisions Concerning the Proper Remedy for an Alleged Error in the Admission of Expert Testimony 10

A. Judgment as a Matter of Law for Defendant Marley is Improper and Contrary to the Previous Decisions of this Circuit and Other Circuits 10

III. The Panel Majority's "De Novo" Review of the District Court's Admission of Expert Testimony Invites Increased Scrutiny and Appeals of Discretionary Rulings on Fed.R.Evid. 702 Issues, Effectively Re-opening the Gate that *Joiner* had Closed 12

A. The Panel Majority Failed to Give the District Court the Deference that is the Hallmark of Abuse of Discretion Review 12

B. The Panel Majority's Substitution of its Own Erroneous Judgment for that of an Able and Experienced District Court Sets a Broad Precedent which Effectively Subverts the Discretion of District Courts and Invites Litigation and Appeals Concerning Evidentiary Rulings 14

CONCLUSION 15

ADDENDUM: MEMORANDUM AND ORDER OF DISTRICT COURT (September 4, 1997); PANEL MAJORITY OPINION AND DISSENT (February 23,1999).

TABLE OF AUTHORITIES

Cases

Aetna Cas. & Stir. Co. v. General Elec. Co.,
758 F.2d 319, 327 (8th Cir. 1985) 15

Dancy v. Hyster Co.,
127 F.3d 649 (8th Cir. 1997) 12, 13

Daubert v. Merrell Dow Pharmaceuticals, Inc.,
509 U.S. 579 (1993) 12, 13, 14

Davis v. American Jet Leasing, Inc.,
864 F.2d 612, 614-15 (8th Cir. 1988)..... 12

Douglass v. Eaton Corp.,
956 F.2d 1339, 1343-44 (6th Cir. 1992)..... 11

Erie R.R. Co. v. Tompkins,
304 U.S. 64 (1938) 7, 8

Excel Corp. v. Bosley,
165 F.3d 635 (8th Cir. 1999) 13

Fort Dodge Hotel Co. v. Bartelt,
119 F.2d 253, 259 (8th Cir. 1941) 9

Fox v. Dannenberg,
906 F.2d 1253, 1256 (8th Cir. 1990) 12

General Elec. Co. v. Joiner,
118 S.Ct. 512 (1997)..... 1, 12, 13, 15

Herman v. Gen. Irrigation Co.,
247 N.W.2d 472, 47 8 (N.D. 1976) 9

Inwood Lab. v. Ives Lab.,
456 U.S. 844, 857 (1982) 15

Jackson v. Pleasant Grove Health Care Ctr.,
980 F.2d 692, 696 (11th Cir. 1993) 11

Midcontinent Broadcasting Co. v. North Central Airlines, Inc.,
471 F.2d 357, 359 (8th Cir. 1973) 1, 10, 11

Nielson v. Armstrong Rubber Co.,
570 F.2d 272, 276-77 (8th Cir. 1978) 12

Peitzmeier v. Hennessy Indus., Inc.,
97 F.3d 293, 296-297 (8th Cir. 1996) 13

Schmidt v. Plains Elec., Inc.,
281 N.W.2d 794 (N.D. 1979) 8, 9

Schudel v. General Elec. Co.,
120 F.3d 991, 995 (9th Cir. 1997) 11

Sumitomo Bank v. Product Promotions, Inc.,
717 F.2d 215, 218 (5th Cir. 1983) 11

Sylla-Sawdon v. Uniroyal Goodrich Tire Co.,
47 F.3d 277, 283 (8th Cir. 1995) 12

West v. American Tel. & Tel. Co.,
311 U.S. 223, 23 7 (1940) 8

Williams v. Pro-Tec, Inc.,
908 F.2d 345, 348 (8th Cir. 1990) 12

Rules of Evidence

Fed. R. Evid. 702 12

INTRODUCTION

The panel majority's decision conflicts with the decisions of the Supreme Court and this Circuit. *See General Elec. Co. v. Joiner*, 118 S.Ct. 512 (1997); *Midcontinent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357, 359 (8th Cir. 1973). A rehearing by the full Court or the panel is therefore necessary to secure and maintain uniformity of the Court's decisions.

Furthermore, this proceeding presents questions of exceptional importance. First, the panel majority misapprehended the record and ignored North Dakota law to support its decision. Second, the panel majority vacated the judgment for plaintiffs after excising expert testimony, improper and contrary to the law of this Circuit and other Circuits. The panel majority also departs from the required standard of review, giving little or no deference to the District Court's evidentiary rulings - contrary to the mandates of the Supreme Court. Plaintiffs' petition should be granted.

POINTS OF FACT, AS OVERLOOKED OR MISAPPREHENDED BY THE PANEL MAJORITY

Evidence of Cause & Origin of the Fatal Fire

On December 30, 1993, Bonnie Weisgram died in a fire at her town home in Fargo, North Dakota. Upon arriving to investigate the fire, Capt. Freeman, a certified fire and arson investigator, found the exterior door closed and interior door open approximately 45°. *Freeman Tr.*, 18-19. Fire was burning on the south (left) side of the front door (the Marley heater was located behind this door). *Id.* at 16-17. No other visible fire was observed. *Id.* at 21, 27. A hole approximately two feet long was found under the Marley heater. *Id.* at 43; *Ex.* 8.

The entryway and sectional couch located on the upper level of the town home contained fire damage. *Id.* at 30-31; *Ex.* 2-4, 6, 8, 9-10. No evidence of flaming combustion in the polyurethane couch cushions was found. *Freeman Tr.*, 31-32, 60-61. No deep charring was found on the floor underneath the couch which would indicate flaming combustion. *Id.* at 32, 60-61. Freeman found no evidence of damage to the ceiling above the couch, and, therefore no evidence of a flaming fire in the couch. *Id.* at 32, 60-63. Further, a piano located 1 ½feet from the couch was in good condition after the fire. *Id.* at 55-56.

Freeman examined the entryway and observed deep charring alone the south wall where the Marley heater was located. *Id.* at 39-40; *Ex.* 2, 3, 4, 8. The hole in the floor was clear evidence that the fire burned most intensely and longest under the Marley heater. *Id.* at 72. Freeman observed significant damage to the ceiling above the entryway, directly over the hole in the floor. *Id.* at 45-46. Freeman also observed heavy heat damage and discoloration on the bottom of the Marley heater. *Id.* at 47-48; *Ex.* 5,7. Freeman concluded that the fire started at the Marley heater. *Id.* at 32, 60-61, 73-74, 84, 116-117, 175-177.

Freeman also concluded that a rug covered a portion of the Marley heater while it was running, causing the vinyl floor to become very hot. The panel majority stated there was no evidence of this *(Add.-2,* slip op. at 8-9), yet Chad Weisgram, Ryan Weisgram, and Merle Higgs testified that there was a "big throw rug" in the entryway prior to the fire that would sometimes catch and get pushed toward the Marley heater when the interior door was opened. Vol. IV, 114, Vol. IV, 8 9, 94; *Higgs. dep.*, 17. Freeman believed the adhesive underneath the vinyl floor began to overheat and "off-gas" (vent) underneath the heater. *Id.* at 64-67.

A remnant of a burned rug was found adjacent to the hole in the floor and was tested for accelerants. Vol. II, 53-54.

None were found. Freeman believed the open front door caused the rug to be pushed onto - and partially cover - the Marley heater prior to the fire, and off-gassing of the adhesive underneath the vinyl floor ignited the rug and other combustibles in the entryway. *Freeman Tr.*, 64-67.

Freeman found no evidence to support the possibility that the fire started in the couch by a cigarette. *Id.* at 60-61. Marley's expert, on the other hand, testified that a smoldering middle cushion was placed behind the interior door and in front of the Marley heater by the decedent - Marley's only explanation for the hole in the floor and the cause of the fire. *Ogle Tr.*, 43-46. Ogle admitted, however, that there was no evidence of a couch cushion in the entryway after the fire. *Id.* at 139-40, 146. Freeman testified that the middle cushion was still located on the couch when he investigated the fatal fire. *Freeman Tr.*, 75-76; Vol. VII, 142-144, 148-149. He personally observed the cushion to be on the couch. *Id.* at 148-149.

Dolence, a qualified professional fire investigator, received the Marley heater from the Fargo Fire Dept. and was provided with a set of photographs taken by Capt. Freeman. *Dolence Tr.*, 24-25. Dolence and Freeman also talked about the fire for over an hour. *Id.* at 25-26. They talked about every possible source of the fire to narrow the focus of the investigation. *Id.* at 26-28.

Dolence then examined the Marley heater and observed heavy damage and discoloration as a result of the fire. *Id.* at 36-37; *Ex.* 5, 7. Dolence also examined the remnants of the heater's aluminum fins and found that approximately one-third of the fins survived the fire virtually unscathed. *Id.* at 50-52, 54-55; *Ex.* 26. This showed that a portion of the heater was uncovered when the fire began, because the heat from the fins was allowed to escape. *Id.* at 50-52; 54-55. The melted aluminum fins indicated that the heat underneath the covered

portion was not allowed to escape and, instead, was reflected back into the heater. *Id.* at 54-57.

After reviewing the physical evidence, Dolence concluded that the entryway rug was pushed onto the Marley heater, causing heat to be trapped in and around the heater. *Id.* at 50-52, 54, 105-06, 168-69, 190-91. The Marley heater continued to produce heat until the adhesive underneath the vinyl flooring began "off-gassing." *Id.* The temperature in and around the heater continued to rise until it reached the ignition temperature for the adhesive, approximately 435° to 450° F. *Id.* at 48-49, 105-06, 190-91. Eventually, that portion of the rug covering part of the heater was consumed by the fire. *Id.* at 136.

Contrary to the panel majority's assertion, plaintiffs did not offer Freeman to testify about a defect in the heater. *Freeman Tr.*, 64. Dolence was also offered as a cause and origin expert only, but Marley chose to cross-examine him about the heater itself *Dolence Tr.*, 126-29, 187.

Evidence of Design Defect

Lazarowicz is a qualified metallurgist who testified that the Marley heater was defective because the silver regulating thermostat contacts contained serrations (serrations, in this case, are defined as grooves that appeared on the regulating thermostats' moveable arm contact). *Lazarowicz Tr.* 30-31, 51-52, 93, 111-12. He also testified that the condition of the heater's aluminum fins after the fire was evidence of a blockage of the air flow. *Id.* at 55.

The serrations observed and identified by Lazarowicz promoted electrical arcing and material transfer between the contact surfaces. *Lazarowicz Tr.*, 30-31, 51-52, 93, 11-12. He testified that approximately 25% of the silver on the moveable arm contact had been transferred to the stationary contact. *Id.* at 32-34, 38. He further testified that the

regulating thermostat contacts separated after the temperature of the contact surfaces reached a point which allowed the metal to soften and "unweld." *Id. at 46-51.*

Lazarowicz also compared the remnants of the Weisgram contacts with the exemplar contacts and found significant differences in the contact surfaces which proved the Marley contacts were welded together at the time of the fire. *Id.* at 40, 112, 114. He testified that the regulating thermostat was defective because the contacts did not "mate" squarely which promoted electrical arcing and material transfer in one quadrant of the moveable arm contact. *Id.* at 51-52. The uneven nature of the contact surface also caused the contacts to weld together at the time of the fire. *Id.* Based upon his examination of the contacts, he concluded that the Weisgram heater started on fire because the excessive amount of electrical arcing and material transfer finally caused the contacts to weld together on the date of the fire. The heater failed to shut off. *Id.* at 55-56, 110-12, 114.

Marley's own testing proved the design defect in the high limit control. That testing demonstrated that the high limit control did not turn off the heater until it reached dangerously high temperatures. *Id.* at 48, 54; *Oggle Tr.* 109-112. Because of its placement behind a deflector shield at the top of the heater, the high limit control, in this case, did not sense the dangerously high temperature until after the fire started. *Lazarowicz Tr.*, 113-14.

Marley's test results showed that a substantially similar 500-watt heater could produce sufficient heat to start a fire. In one test, the exemplar was allowed to run with the regulating thermostat and high limit control in place (normal operation). In that test, the air temperature in front of the heater reached 403°F before it turned off. *Ogle Tr.*, 109. In the same test, the aluminum fin tube which houses the heating element registered a temperature of 625°F. *Id.* at 109-10. It is important to note that the Marley heater had a regulating

thermostat which is used to increase or decrease the temperature by turning a dial. It also had a high limit control designed to turn off the heater when it senses temperatures in excess of 190°F.

In a second test by Marley, with the high limit control in place, the air temperature in front of the heater reached 417°F before it turned off. *Id.* at 110-11. This reading is 227°F higher than the temperature that should trigger the high limit control and turn off the heater.

Capt. Freeman testified that the flash point of an oil-based adhesive used to affix vinyl flooring is approximately 140°F and the ignition temperature is between 400° and 450°F. *Freeman Tr.*, 65-66. Dolence similarly testified that an asphalt (oil) based adhesive is a relatively flammable material with an ignition temperature between 435° and 450°F. *Dolence Tr.*, 48-49. Freeman also testified that the ignition temperature for a cellulose-based rug, similar to the rug in the Weisgram home at the time of the fatal fire, is between 375° and 520°F. *Freeman Tr., 64-65.*

ARGUMENT

I. PLAINTIFFS' PETITION SHOULD BE GRANTED TO SECURE AND MAINTAIN THE UNIFORMITY OF THE COURT'S DECISIONS RELATIVE TO THE APPLICATION OF SUBSTANTIVE STATE LAW UNDER THE *ERIE* DOCTRINE, A QUESTION OF EXCEPTIONAL IMPORTANCE.

A. Under the *Erie* Doctrine the Panel Majority is Required to Apply the Law as Defined by the North Dakota Supreme Court. Yet it Ignored North Dakota Law Relative to Plaintiffs' Burden of Proof.

Under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, (1938), the decisions of the North Dakota Supreme Court are binding on the panel majority in rendering their opinion in this case. The panel majority had the duty to "ascertain from all the available data what the state law is and apply it rather than prescribe a different rule, however superior it may appear." *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940). Despite such clear mandates, the panel majority mysteriously ignored applicable North Dakota law relative to plaintiffs' burden of proof. *See Schmidt v. Plains Elec., Inc.*, 281 N.W.2d 794 (N.D. 1979). A rehearing en banc is warranted in order to secure uniformity of prior decisions relative to this issue and to remedy the erroneous deprivation of plaintiffs' substantive rights.

B. The Panel Majority's Rendition of North Dakota Law Relative to Plaintiffs' Burden of Proof is Clearly Erroneous, Fundamentally Affecting Plaintiffs' Substantive Rights.

The panel majority neither correctly ascertained, nor correctly applied North Dakota law relative to Plaintiffs' burden of proof. *Add.-2,* slip op., pgs. 4-5. The panel majority does not discuss the substantial circumstantial evidence of the defective condition of the Marley heater nor mention that under North Dakota law, circumstantial evidence will suffice to prove the existence of a defect.

Conclusive proof is not necessary to show the existence of a defect under North Dakota law. *Herman v. Gen. Irrigation Co.*, 247 N.W.2d 472, 478 (N.D. 1976); *Schmidt v. Plains Elec., Inc.*, 281 N.W.2d 794 (N.D. 1979) (in products liability action arising out of fire which was allegedly caused by malfunction or faulty design of electric wall heater, circumstantial evidence was sufficient to support imposition of strict liability on grounds of malfunction or faulty design of

heater). A defect may be inferred from proof that the product did not perform as intended by the manufacturer. *Herman*, 247 N.W.2d at 478.

Sufficient evidence was offered and received from which inferences in support of the plaintiffs' theory could reasonably be drawn. The able and experienced trial judge and the jury obviously accepted and found plaintiffs' evidence more credible. [I]t is for the jury to say what inferences shall be drawn, and they may be guided to their conclusion by the rule as to the burden of proof. Sometimes that rule may completely determine the result of a trial." *Fort Dodge Hotel Co. v. Bartelt*, 119 F.2d 253, 259 (8th Cir. 1941).

Plaintiffs' experts' opinions on the cause and origin of the fire and the physical evidence overwhelmingly support the jury's determination that the fire causing Bonnie Jo Weisgram's death resulted from a defect in the Marley heater. *Add.-2*, slip. op., Bright, J., dissenting, pgs. 20-23. This question of fact, decided by the jury upon conflicting evidence, must not be subject to re-examination by the panel majority. The panel majority's misstatement of the evidence conveys its basic misunderstanding of that evidence as applied to North Dakota law - which affected its underlying erroneous opinion. Because of the clearly erroneous application of North Dakota law affecting the substantial rights of plaintiffs, the Court should rehear this matter en banc. A two judge majority cannot be allowed to usurp both the role of the jury and the District Court.

II. PLAINTIFFS' PETITION SHOULD BE GRANTED TO SECURE AND MAINTAIN THE UNIFORMITY OF THE COURT'S DECISIONS CONCERNING THE PROPER REMEDY FOR AN ALLEGED ERROR IN THE ADMISSION OF EXPERT TESTIMONY.

A. Judgment as a Matter of Law for Defendant Marley is Improper and Contrary to the Previous Decisions of this Circuit and other Circuits.

Judge Bright correctly alerts us to the procedural impropriety of the panel majority's overreaching directive to grant Marley Company judgment as a matter of law. *Add.-2,* slip op., Bright, J., dissenting at pgs. 22-23. It has long been the law of this Circuit that if the District Court indeed erred in admitting the testimony of plaintiffs' experts, the relief to be awarded is a new trial, **not** judgment as a matter of law. *Id.*; *Midcontinent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357, 359 (8th Cir. 1973) (holding that the proper remedy for disposing of evidence erroneously admitted during the course of the trial is a new trial).

Because the panel majority is of the opinion portions of plaintiffs' experts' testimony were erroneously admitted, the panel has no alternative, under the law of this Circuit, but to grant a new trial rather than judgment as a matter of law to Marley. *Midcontinent*, 471 F.2d at 359. The panel majority cannot deviate from established precedent and ignore the evidence presented to the jury. *Id. See Schudel v. General Elec. Co.*, 120 F.3d 991, 995 (9th Cir. 1997) (adopting the rule expressed in this Circuit, and citing *Jackson v. Pleasant Grove Health Care Ctr.*, 980 F.2d 692, 696 (11th Cir. 1993); *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1343-44 (6th Cir. 1992); *Sumitomo Bank v. Product Promotions, Inc.*, 717 F.2d 215, 218 (5th Cir. 1983); and *Midcontinent,* 471 F.2d at 358-59).

The panel majority "can discern no reason to give the plaintiffs a second chance to make out a case of strict liability." *Add.-2,* slip. op. at 4-5, ftn. 2. However, where a two judge majority opinion ignores North Dakota law impacting plaintiffs' substantive rights, departs from Circuit precedent, and misapprehends the facts, plaintiffs should be

afforded a "second chance" by the full Court – with consideration of all the evidence and a correct application of the law.

Under the circumstances, the grant of judgment as a matter of law to Marley was not the proper remedy under the law of this Circuit. The panel majority's clearly erroneous determination must be closely scrutinized by the Court en banc to maintain the uniformity of its decisions. If such an extraordinary departure from Circuit precedent is to be made, it should be made under the scrutiny of the full Court, not a panel majority.

Once the full Court considers all of the evidence admitted at trial, the full Court will conclude there was substantial evidence to support the jury's verdict. If the full Court then determines that evidence was erroneously admitted affecting the substantial rights of Marley, a new trial should be granted. A new trial on liability would be all that is necessary, as damages have already been determined. The magnitude of the panel majority's errors necessitates, at a minimum, a new trial.

III. THE PANEL MAJORITY'S "DE NOVO" REVIEW OF THE DISTRICT COURT'S ADMISSION OF EXPERT TESTIMONY INVITES INCREASED SCRUTINY AND APPEALS OF DISCRETIONARY RULINGS ON FED.R.EVID. 702 ISSUES, EFFECTIVELY RE-OPENING THE GATE THAT *JOINER* HAD CLOSED.

A. The Panel Majority Failed to Give the District Court the Deference that is the Hallmark of Abuse of Discretion Review.

"'Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony.'" *Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 283 (8th Cir.

1995)(quoting *Fox v. Dannenberg*, 906 F.2d 1253, 1256 (8th Cir. 1990)). Once the trial court has determined "that a witness is competent to testify as an expert, challenges to the experts skill or knowledge go to the weight to be accorded the expert testimony rather than to its admissibility." *Fox*, 906 F.2d at 1256; *Williams v. Pro-Tec, Inc.*, 908 F.2d 345, 348 (8th Cir. 1990); *Davis v. American Jet Leasing Inc.*, 864 F.2d 612, 614-15 (8th Cir. 1988); *Nielson v. Armstrong Rubber Co.*, 570 F.2d 272, 276-77 (8th Cir. 1978).

Rule 702 requires a district court to make a preliminary finding that proffered expert testimony is both relevant and reliable. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). District courts are to perform a "gatekeeping" function to insure that proffered expert testimony is both relevant and reliable. *See Dancy v. Hyster Co.*, 127 F.3d 649 (8th Cir. 1997); *Peitzmeier v. Hennessy* Indus., *Inc.*, 97 F.3d 293, 296-297 (8th Cir. 1996).

The United States Supreme Court, in *General Elec. Co. v. Joiner*, 118 S.Ct. 512 (1997) made it unequivocally clear that abuse of discretion is the proper standard of review by which an appellate court reviews a district court's decision to admit or exclude scientific evidence. *Id.* This appellate court cannot reverse the evidentiary rulings of the District Court unless they were manifestly erroneous. *Id.* at 517; *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999).

Irrespective of established precedents of this Circuit and unequivocal mandates of the United States Supreme Court, the panel majority gives no deference to the District Court and, more or less, reviews the District Court's admission of plaintiffs' experts' testimony de novo. In this case, the District Court found no reason to exclude their testimony, as each of the experts were qualified to render their opinions which were "well-grounded in established methodologies." *Add.-1*, pg. 6.

After analyzing the testimony in light of *Daubert*, the District Court found that "no *Daubert* problems were

present." *Add.-1*, pg. 6-8. The District Court evaluated the underlying factual support and evidence supporting the experts' bottom-line opinions and determined that adequate support existed to mark the testimony as reliable. A proper application of the correct standard of review in this case indicates that the District Court did not abuse its discretion. *See Add.-2*, slip op., Bright, J., dissenting, at pgs. 16-17.

The overarching theme throughout the panel's majority opinion is an open dissatisfaction with the conclusions reached by plaintiffs' experts -- leading to the panel's erroneous conclusion that the testimony of plaintiffs' experts is unreliable. The panel majority goes too far, making a critical error in its analysis of reliability by impermissibly assessing plaintiffs' experts' credibility. *Daubert* forbids judges from assessing the strength of an expert's conclusions, which is the province for the jury. 509 U.S. at 596.

B. The Panel Majority's Substitution of Its Own Erroneous Judgment for that of an Able and Experienced District Court Sets a Broad Precedent Which Effectively Subverts the Discretion of District Courts and Invites Litigation and Appeals Concerning Evidentiary Rulings.

The panel majority does not explain the reasons for its deviation from precedent and practice in this Circuit. If deference to the District Court would be defined as the panel majority would have it defined, every case would be appealed. The panel majority has essentially conducted a trial de novo of the District Court's assessment of the reliability of plaintiffs' proffered expert testimony, substituting its own erroneous judgment and reasoning for that of the District Court, rather than reviewing the District Court's rulings and reasoning for an abuse of discretion. The panel majority

radically departs from the directives of the United States Supreme Court in this regard.

District Court judges, unlike appellate judges, have a broad array of tools which can be brought to bear on the evaluation of expert testimony. Because of the District Court's special vantage point, it is quite odd and contrary to law for the panel majority to start from scratch and undertake its own de novo review of the District Court's rulings. *See Joiner,* 118 S.Ct. 512. "An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court might give the facts another construction [or] resolve the ambiguities differently." *Aetna Cas. & Sur. Co. v. General Elec. Co.,* 758 F.2d 319, 327 (8th Cir. 1985) (quoting *Inwood Lab. v. Ives Lab.,* 456 U.S. 844, 857 (1982)).

The broad precedent set by the panel majority will profoundly affect the trials and outcomes in substantial numbers of cases, especially fire cases, effectively subverting the broad thrust of the Federal Rules of Evidence, the discretion of District Courts within this Circuit, and raising the bar to an impossible height for the admission of expert testimony from qualified cause and origin experts in fire cases involving products. The importance of these issues require examination by the Court en banc.

CONCLUSION

The panel majority can only be seen to have recited selected facts (often irrelevant) from the record to give a veneer of plausibility to a core of speculation. In the end, the panel majority's conclusions about how the jury should have decided the case, should not, and cannot be injected into their analysis of the law, let alone alter the results of the trial and the discretionary rulings of an able and experienced trial judge. For these reasons and the reasons stated above and in

the dissent of Judge Bright, the decision of the panel majority should be vacated and this matter reheard by the panel or the Court en banc.

Respectfully submitted,

Dated: 3/17/99

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Eighth Circuit Civil No. 97-3735NDF
District Court Civil Nos. A3-95-103 and A3-95-104

In the
UNITED STATES COURT OF APPEALS
For the Eighth Circuit

Chad Weisgram, et al.

and

State Farm Fire & Casualty Insurance Company,

Plaintiffs/Appellees,

vs.

Marley Company, et al.

Defendants/Appellants.

On appeal from the United States District Court
for the District of North Dakota

APPELLANTS' RESPONSE TO APPELLEES' PETITION FOR REHEARING AND TO SUGGESTION FOR REHEARING EN BANC

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TABLE OF CONTENTS

Table of Cases, Statutes and Other Authorities ii

I. INTRODUCTION 1

II. ARGUMENT 2
- A. The exposition of the facts in the majority opinion was accurate 2
- B. The panel majority correctly applied North Dakota law regarding plaintiffs' burden of proof 4
- C. Granting judgment as a matter of law was proper 6
- D. The panel majority employed the proper standard of review 8

III. CONCLUSION 11

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Cases

Brock v. Caterpillar, Inc.,
94 F.3d 220 (6th Cir. 1996) 9

Compton v. Subaru of America, Inc.,
82 F.3d 1513 (10th Cir. 1996) 1

Dancy v. Hyster Co.,
127 F.3d 649, 653 (8th Cir. 1997) 1

Daubert v. Merrell Dow Pharmaceuticals, Inc.,
509 U.S. 579 (1993) 1, 8, 9,10

Endresen v. Scheels Hardware & Sports Shop, Inc.,
560 NW2d 225, 229 (N.D. 1997) 5, 6

General Electric Co. v. Joiner,
522 US. 136, 143 (1997) 1, 10

Kumho Tire Company v. Carmichael,
1999 WL 152275 (U.S.) 1, 10

Lindsay v. McDonnell Douglas Aircraft Corp.,
460 F.2d 631 (8th Cir. 1972) 6

McKnight v. Johnson Controls, Inc.,
36 F.3d 1396, 1400 (8th Cir. 1994) 9

Midcontinent Broadcasting Co. v. North Central Airlines, Inc.,
471 F.2d 357 (1973) 7, 9

Omaha Indian Tribe v. Wilson,
575 F.2d 620, 642 (8th Cir. 1978) 7, 8, 9

Peitzmeier v. Hennessy Industries, Inc.,
97 F.3d 293 (8th Cir. 1996) 1, 8

Peterson v. City of Plymouth,
60 F.3d 469, 475 (8th Cir. 1995) 10

Smelser v. Norfolk Southern Railway Co.,
105 F.3d 299, 302 (6th Cir. 1996) 9

Wright v. Willamette Indus., Inc.,
91 F.3d 1105, 1108 (8th Cir. 1996) 7, 9

Statutes

N.D.Cent.Code § 28-01.3-06 5

I. INTRODUCTION

The petition should be denied. None of this court's stringent threshold requirements for rehearing have been fairly met. The panel majority had it right. This is "not a close case." *Slip op. 4 at fn. 2.* The holding follows established Eighth Circuit law and it is entirely consistent with recent pronouncements of the Supreme Court in *Kumho Tire Company v. Carmichael, 1999 WL 152275 U.S.,* and *General Electric Co. v. Joiner, 522 U.S. 136, 143 (1997).* In fact, *Kumho Tire* confirms plaintiffs had it wrong when they urged this court to adopt the Tenth Circuit's rationale in *Compton v. Subaru of America, Inc., 82 F.3d 1513 (10th Cir. 1996)* that testimony on engineering issues falls outside the scope of *Daubert* and it confirms this court had it right all along when it held *Daubert's* reliability criteria do indeed apply to engineers' and technical experts' opinions in product liability cases.

Contrary to the arguments in plaintiffs' petition, the panel majority did not misapprehend the record. Its exposition of facts was accurate, with record citation to every part of it. The panel correctly cited and applied North Dakota statutory and case law regarding the plaintiffs' burden of proof in a product liability case and correctly found a complete failure of proof on the issues of product defect and causation, thus entitling Marley to judgment as a matter of law. The panel majority correctly determined that there was not substantial evidence in the record to support the verdict even when the evidence was viewed in the light most favorable to the plaintiffs. The majority applied the correct standard of review to the district court's evidentiary rulings and eight times found the district court abused its "admittedly broad" discretion by exposing the jury to fundamentally unsupported expert opinion. Finally, the panel followed valid precedents in this circuit and other circuits in determining that judgment as a

matter of law is the appropriate disposition where there is not sufficient evidence to support a jury verdict and where the plaintiffs had their day in court. In summary, the panel carefully followed the law in determining that the lower court judgment was wrong and could not stand. There is no basis for a rehearing.

II. ARGUMENT

A. The exposition of the facts in the majority opinion was accurate.

Plaintiffs argue first that the panel majority got the facts wrong. *Pet. 1-7.* Then they rehash their theory of the case for seven pages, without pointing to a single item that the majority opinion misstated, miscited, misconstrued, or overlooked.

Some of their points require brief response. At pages 2-4, plaintiffs reiterate Freeman's and Dolence's testimony that a rug was "pushed onto the Marley heater," without ever attempting to address the majority's explicit concern that Dolence's testimony about the rug's position was pure "conjecture." *Slip op. 10.* In reality, Dolence admitted at trial that no eye witness had ever seen a rug blocking the heater and admitted that Freeman had told him on the same day he investigated the fire he saw "nothing blocking that heater." *Dolence, 132-33; 136-37.*

At page 4 of the petition, plaintiffs say that they did not offer Freeman to testify about a heater defect. This is not candid. As the majority correctly noted, Freeman told the jury, over objection, at least five times that the heater malfunctioned, "ran away," and started the fire. *Freeman, 32, 60, 63, 64, 68-69, 78, 175.*

Plaintiffs' statement on page 5 that Dolence was only offered as a cause and origin expert and not to testify about

the "heater itself" is similarly lacking in candor. Plaintiffs advise that Marley *chose* to cross-examine Dolence about the heater. This advice is inexplicable in light of the fact that plaintiffs' counsel, on *direct,* asked Dolence questions about his examination of the heater and his findings with respect to it for over *twenty pages* of the trial record. *Dolence, 80-100; see also 36-37, 50-59.* Indeed Dolence did testify about the "heater itself" on direct: "It was the operation of the heater that continued to heat by being covered up that allowed this .... catastrophic event." *Id. 57.* "It was my opinion that the heater was the source of the fire." *Id. 83.* Dolence also told the jury, on direct, that he had an opinion that the thermostat "failed" and caused "uncontrolled heating." *Id. 90-91, 92.* Still on direct, Dolence said the high limit device did not sense heat as it should have and thus failed to shut the heater off. *Id. 92-93.*

At pages 5-7 of the petition, plaintiffs described their theory of design defect. They simply summarized again Lazarowicz's observation that there were serrations on the thermostat contacts and his other observations of the heater. But plaintiffs' discussion on these points is most noteworthy for what it does *not* address. They did not even attempt to answer the panel majority's point: that Lazarowicz had no specialized knowledge about heaters and admitted he was *not an expert* in fire cause and origin, in baseboard heater operation, or in the design or testing of contacts in this type of heater. *Slip op. 11-12.* Moreover, they did not even try to argue that Lazarowicz was actually qualified in heater design or that his opinions about the design were actually reliable. Even in view of the panel majority's exposure of Lazarowicz's total lack of experience, education, or study that would qualify him to testify about this heater's operation or design, plaintiffs did not come forward with any facts in the record bolstering Lazarowicz's credentials which the majority might have overlooked. They did not because no such bolstering

facts exist. The majority was correct in its observation that Lazarowicz opined to the jury about defects in the heater's design while knowing "practically nothing" about this or any other heater. *Id. 12.* In short, plaintiffs' petition does not even attempt to refute the panel majority's conclusion that Lazarowicz's opinions amounted to no more than "subjective belief or unsupported speculation." *Id. 13.*

Finally, and perhaps most misleading of all, is plaintiffs' contention on pages 6-7 that Marley's "own testing" proved the design defect in the high limit control. This is a total misconstruction of the record. In reality, Dr. Ogle, an independent consultant retained by Marley, testified that his testing program conducted on the Ferguson exemplar heater demonstrated that the high limit switch cycled exactly as it was designed to cycle and the overall temperatures seen by the heater were far too low to pose a fire hazard either to a rug or to adhesive under the floor. *Ogle, 79-83, 113-120.* More to the point, plaintiffs failed to answer the panel majority's observation that it was *plaintiffs'* own testing conducted by Dolence that established there was no defect in the heater's design. *Slip op. 11.* Dolence checked the temperatures generated by the exact same Ferguson exemplar that Ogle later tested and found they did not pose a danger. *Id.* He tried, but could not make the heater overheat, even at maximum output. *Id.* Based on his own temperature test results, Dolence admitted in deposition and at trial that the Marley heater was not defective in design in any respect. *Dolence, 139-40, 143.* Dolence never tested his "run away" heater theory. *Slip op. 10.* Marley did and proved it false; the Marley heater is not capable of running away. *Ogle, 79-83, 113-120.*

B. The panel majority correctly applied North Dakota law regarding plaintiffs' burden of proof.

Plaintiffs argue at pages 8-10 of the petition that the panel majority incorrectly applied North Dakota law because it did not discuss the "circumstantial evidence" of the "defective condition" of the Marley heater. The point is not well taken. The petition never identified exactly what plaintiffs' circumstantial evidence of defect consists of.[1] The panel majority correctly cited and applied North Dakota law regarding plaintiffs' burden of proof in a product liability case as set forth in *Endresen v. Scheels Hardware & Sports Shop, Inc., 560 NW2d 225, 229 (N.D. 1997).* Both the *Endresen* court and the North Dakota Product Liability Act require that a product actually have a defect or be in a defective condition at the time of its sale to support a product liability action. *N.D.Cent.Code § 28-01.3-06.* Plaintiffs were not specific in their petition about exactly how the appellate court misapplied North Dakota law, but they seemed to be suggesting that this court should just *assume* plaintiffs proved their case by circumstantial evidence.

In reality, this is not an appropriate case for application of the circumstantial evidence rule. The Eighth Circuit said in *Lindsay v. McDonnell Douglas Aircraft Corp.,460 F.2d 631 (8th Cir. 1972)* that courts would prefer in a strict liability case to "have proof of a specific defect causing the accident" unless that is not possible because the evidence has been *destroyed. Id. 638.* The evidence in this case was not destroyed, but was merely damaged due to exposure to an external fire. Dolence inspected the heater components and testified that he was not able to identify a particular design or

[1] The panel majority rightly observed that during oral argument plaintiffs remained vague about their defect theory. *Slip op. 4.* Counsel for State Farm seemed to abandon any design defect claim.

manufacturing defect or malfunction, but merely said the thermostat and high limit control must have failed. *Slip op. 10.* This is not called "circumstantial evidence" of a "defective condition." This is called "rank speculation" by an expert. *Id.*

Plaintiffs have not explained why this court should even discuss permitting proof of a defect by circumstantial evidence in a case where it is not possible to exclude an alternative potential cause of the fire. In *Endresen, supra,* the North Dakota Supreme Court said proof by circumstantial evidence is appropriate only where the evidence *"excludes equally reasonable inferences of other causes for which the defendant is not responsible."* (emphasis added) *Id. 232.* In this case, Marley contends the fire was caused by cigarette ignition of the sofa, which was partially destroyed by the fire. The panel majority correctly noted that neither the Weisgram family nor State Farm took any action to preserve the sofa for inspection or testing by the defendant, but discarded it before this litigation. *Slip op. 8-9 at fn. 5.* Ironically, certain admissions in plaintiffs' petition conclusively prove Marley's cigarette ignition theory of the case was correct. Plaintiffs said at page 2 that Freeman found no evidence of a "flaming fire" in the sofa, indicating only a *smoldering* fire.[2] See also, *Bright, dissent, Slip op. 17. ("The sofa exhibited signs of smoldering combustion, but not flaming combustion.")* But Dr. Ogle presented unrefuted scientific evidence that the smoldering fire in the sofa could only have been ignited by a *smoldering ignition source, and the only smoldering ignition source in the house was a cigarette. Ogle, 39, 48.* Plaintiffs could not and did not present a shred of evidence to contradict this expert opinion.

[2] Dr. Ogle, a chemical engineer and an expert in combustion, explained that there was smoldering combustion in the sofa that eventually transitioned into flaming combustion. *Ogle, 152-53.*

C. Granting judgment as a matter of law was proper.

Plaintiffs argue that the Eighth Circuit's holding in *Midcontinent Broadcasting Co. v. North Central Airlines, Inc., 471 F.2d 357 (1973)* calls for a new trial, not a JMAL, when expert evidence is erroneously admitted. But *Midcontinent* is not on point, and the panel majority correctly followed valid precedents established by this court in *Wright v. Willamette Indus., Inc., 91 F.3d 1105, 1108 (8th Cir. 1996)* and in *Omaha Indian Tribe v. Wilson, 575 F.2d 620 640 (8th Cir. 1978).* In *Midcontinent,* the trial court granted JNOV when it concluded after a jury verdict that it had erred in admitting certain expert testimony. Part of the appellate court's rationale for determining that JNOV was not appropriate in that particular case was its concern that plaintiff, if forewarned, might have supplied "further foundation or even totally different evidence." *Id. 359.* These circumstances are clearly distinguishable from the facts in the case at hand.

There is no suggestion in this case of any additional foundation or further proof plaintiffs could have introduced to bolster their theory that a heater defect caused the fire. To the contrary, as the majority panel pointed out in footnote 2 *(Slip op. 4-5),* Weisgram and State Farm had their day in court. No litigant is entitled to more than that. There is no reason to reopen discovery here. This is the same conclusion this court reached in granting JMAL to the defendant in *Peitzmeier v. Hennessy, supra,* after the trial court determined plaintiffs expert testimony was inadmissible.

As the panel majority rightly pointed out, plaintiffs' entire theory was based on "rampant speculation," not substantial evidence. In this circuit, expert speculation cannot support a judgment. *Omaha Tribe, supra, 640-46.* The case should never have gone to the jury, but did. By rights, the trial court

should have granted Marley's motion for a directed verdict at the close of plaintiffs' case on the stated ground that plaintiffs had a complete failure of proof as to a design defect and as to any mechanism by which this 500-watt heater, even if it had continued to run, could have "run away" and caused a fire. *R. VI, 4.* The trial court had another opportunity to grant a directed verdict motion at the close of all the evidence when Marley again pointed out that the plaintiffs had failed to meet their burden of proof because neither Dolence nor Lazarowicz had provided an explanation of the cause of the fire. *R. VII, 160-61.* Failing that, the trial court should have granted Marley's post-trial motion for JMAL *(App. 000300-310)* when Marley demonstrated that plaintiffs' entire case was based on unsupported expert speculation, which has never been allowed to support a verdict in this circuit before or after *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 590 (1993)("the word 'knowledge' connotes more than subjective belief or unsupported speculation.")* Marley informed the trial court in its motion for JMAL that this circuit's pre- and post-*Daubert* case law has never allowed experts to speculate and has always held that expert speculation is not substantial evidence to support the judgment. *Def.'s mot. for JMAL, App. 000300-310.*

The trial court's denial of JMAL is a legal question that is fully reviewable in this court based on the same standard that was before the district court: whether there was sufficient evidence to support the verdict. *McKnight v. Johnson Controls, Inc., 36 F.3d 1396, 1400 (8th Cir. 1994).* Under the circumstances of this case, *Midcontinent* is not the relevant precedent. Here the reviewing court did not simply "excise" the expert opinion as the trial judge in *Midcontinent* did in reaching its conclusion that there was no substantial evidence to support the verdict. Rather, after reviewing the entire record, the panel majority took pains to explain that plaintiffs' entire proof consisted of no more than "subjective belief and

unsupported speculation." *Slip op. 13.* In this respect, *Omaha Indian Tribe, supra,* and *Wright v. Willamette, supra,* provided ample precedent for granting JMAL. In *Omaha,* which was decided after *Midcontinent,* this court vacated and remanded to the trial court with directions to enter judgment in favor of the tribe after determining that the land owners' experts' opinions were mere speculation, not "substantial evidence." *Id. 646. Accord, Wright v. Willamette, supra; Brock v. Caterpillar, Inc., 94 F.3d 220 (6th Cir. 1996); Smelser v. Norfolk Southern Railway Co., 105 F.3d 299, 302 (6th Cir. 1996).*

D. The panel majority employed the proper standard of review.

Contrary to plaintiffs' suggestion at page 12 of the petition, the panel majority did not conduct a *de novo* review of the expert testimony. Instead, the majority explicitly and repeatedly stated that it was indeed applying the abuse-of-discretion standard to the district court's evidentiary decisions, as required by the U.S. Supreme Court decision in *Joiner,* and by previous rulings of this circuit. See, e.g., *Peterson v. City of Plymouth, 60 F.3d 469, 475 (8th Cir. 1995).* The majority panel nevertheless said eight times that the trial court abused its "admittedly broad" discretion when it admitted "blatant speculation" from Freeman, "rank speculation" from Dolence, "unsupported speculation" from Lazarowicz, and "rampant speculation" from all three experts about "how the 'run away' heater might have ignited the fire." *Slip op. 6-14.*

Nothing in the recent *Kumho Tire* decision requires a rehearing here. *Kumho* clarified that *Daubert's* gatekeeping obligation applies to all expert testimony and reiterated *Joiner's* holding that abuse of discretion is the appropriate standard. Since the panel majority took some pains to explain it was following *Joiner* precisely, it follows that it did extend

appropriate deference to the trial judge. *Kumho* requires nothing more. *Kumho* does not require, as plaintiffs seem to be suggesting here, a rubber stamp of every trial court ruling admitting or excluding expert testimony. As Justice Scalia noted in his concurring opinion in *Kumho,* "trial court discretion in choosing the manner of testing expert reliability–is not discretion to abandon the gatekeeping function." When an able and experienced trial court abuses its "admittedly broad" discretion by admitting "rampant speculation" by experts, it is incumbent upon the appellate court to so hold–and to reverse where, as here, the testimony influenced the jury. There would be no need for appellate review of evidentiary decisions if trial courts were free to admit expert opinion without first determining the expert is qualified and without first scrutinizing the opinion for some indicia of reliability.

III. CONCLUSION

The trial court did abandon it gatekeeping function in this case and the panel majority was right to hold that this was an abuse of discretion. This was not a close case. The jury verdict cannot stand.

Respectfully submitted.

Dated this 8th day of April, 1999.

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CERTIFICATE OF SERVICE

A true and correct copy of the aforementioned document was on the 8th day of April, 1999, mailed to:

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Order Denying Petition for Rehearing and for Rehearing En Banc included in Joint Petition for Writ of Certiorari